

BLACKSTONE'S COMMENTARIES,

SYSTEMATICALLY ABRIDGED,

ETC. ETC.

WITH GREAT ADDITIONS.

BLACKSTONE'S COMMENTARIES

SYSTEMATICALLY

ABRIDGED AND ADAPTED

TO

THE EXISTING STATE OF THE LAW AND CONSTITUTION

WITH GREAT ADDITIONS

BY

SAMUEL WARREN

OF THE INNER TEMPLE, ESQUIRE, M.P., D.C.L., F.R.S., RECORDER OF HULL, AND ONE OF HER MAJESTY'S COUNSEL.

OF A CONSTITUTION SO WISELY CONTRIVED, SO STRONGLY RAISED, AND SO HIGHLY FINISHED, IT IS HARD TO SPEAK WITH THAT PRAISE WHICH IS JUSTLY AND SEVERELY ITS DUE: THE THOROUGH AND ATTENTIVE CONTEMPLATION OF IT WILL FURNISH ITS BEST PANEGYRIC.—*Sir William Blackstone.*

SECOND EDITION.

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TO THE RIGHT HONOURABLE

EDWARD GEOFFREY, EARL OF DERBY,

CHANCELLOR OF THE UNIVERSITY OF OXFORD,

ETC., ETC., ETC.

MY LORD,

The lapse of nearly a century, has not impaired the beauty and vigour of the style in which Sir William Blackstone wrote his Commentaries, nor obscured his lucid arrangement of a subject necessarily so intricate and obscure, as the laws of England. Nor has it dimmed the lustre of his loyalty and liberality of sentiment; his humane endeavours to reform offenders, and mitigate the criminal code of his day, written in blood-red letters;* his enlightened desire to extend the elective franchise; and his noble solicitude for our liberties, as bound up with Trial by Jury. Of all these enduring titles to our admiration, the work now presented to the public, exhibits ample evidence.

That lapse of time, however, has greatly impaired the intrinsic value of his far-famed Commentaries, at the present day, as an authority for existing law, in consequence of the revolution which that law has undergone, during the interval. Such changes as have been effected within even the last twenty years,

* "It is a melancholy truth," says the Commentator (*post*, p. 574), "that among the variety of actions which men are daily liable to commit, no fewer than *one hundred and sixty* have been declared, by Act of Parliament, worthy of instant death!" Practically, only murder is now so punished.

have thrown an antiquarian shadow over at least two-thirds, if not more, of the Commentaries; leaving, however, even those portions invaluable, as an accurate and elegant exposition of law now obsolete, but which, in the language of a distinguished American jurist, in speaking of the Commentaries, is necessary to illustrate that which remains in use.*

In this volume is presented to the public, a large portion of what remains intrinsically valuable in the Commentaries, as existing authority; and it has been my endeavour, with a painful sense of unworthiness for such an undertaking, but after nearly twenty years' study of the Commentaries, (with a view, now abandoned, of presenting them entire to the public,) to incorporate into portions of the text,—originally selected by a deceased friend of consummate learning,—as nearly as I could approach towards it, in the style and spirit of the Commentator, an elementary exposition of the existing law and constitution.

This I have done with scrupulous fidelity, and even judicial impartiality; and great as are the anxiety and pains which this work has cost me, they are exceeded by my sense of responsibility.

On contemplating my completed labours, I cannot help expressing an opinion, that the view here exhibited of our remodelled Institutions, may occasion serious reflection, mingled with satisfaction and anxiety, to persons of every station, and shade of political opinion, patriotically interested in the welfare of the State, and the stability of our Institutions while being accommodated to the altering temper and circumstances of the times.

It appeared to me that the present was a fitting opportunity for bringing forward this work; when there exists such a laudable and universal desire, especially in our Academical Institutions, to diffuse, among all classes of society, a knowledge of at least, the elements of our laws; and this I have long been urged to do, by those whose wishes and opinions no one can treat otherwise than with deference and respect.

* Chancellor Kent, *post*, Chap. XLIII. p. 422.

I have ventured to ask, and rejoice that I have obtained, permission to inscribe this volume to your Lordship, as the Head of that ancient and renowned UNIVERSITY, which nurtured the Author of the *Commentaries on the Laws of England*. I beg to offer this as a faint expression of personal respect and regard for your Lordship, and of gratitude for the distinction recently conferred, by that illustrious University, at your Lordship's instance, upon

My Lord,

Your Lordship's very faithful and obliged Servant,

SAMUEL WARREN.

INNER TEMPLE,
TRINITY TERM, 1855.

PREFACE TO THE SECOND EDITION.

THE exhaustion, within one year, of a very large impression of this work, appears to have justified the hope that it might be favourably received by the Profession and the Public. In this Second Edition, have been made certain valuable emendations, suggested by persons of great professional, and high judicial, eminence. I beg to express my cordial thanks for these obliging intimations, such as will always be received with grateful deference.

While several important legislative changes, effected since this volume appeared, and falling fairly within its scope, will be found carefully incorporated into the text, I anxiously repeat, that the work has been framed, with much consideration, upon a plan rendering it, comparatively speaking, independent of any but such extensive changes in our system, as partake of an organic character. Had this been otherwise, the work must have been recast almost annually, in order to keep pace with the rapid progress of modern legislation, and the corresponding exertions of our Courts to carry its enactments into practical operation.—During the Session which has just closed (1855-6), alterations of great magnitude were attempted, and some effected. It may be permitted to all interested in the welfare of the State, to

express an earnest hope, that the Legislature will not suffer itself to be hurried, in matters of such moment, but proceed with dignified, deliberate, and circumspect consideration.

In the meantime, it is suggested to younger purchasers of the former or present edition of this work, that they would find their account in carefully watching the action of the Legislature, and noting its results, in the margin of the text, or otherwise, especially where that action is of an important and extensive character. It would be a task so perceptibly profitable, as quickly to become pleasant; and that, to not only lay and professional readers and students, but to even members of the Legislature themselves.

S. W.

INNER TEMPLE,
Trinity Vacation, 1856.

PREFACE.

IN the year 1835, my late distinguished and very learned friend Mr. John William Smith, whose premature death ten years afterwards, was deplored by all ranks of the profession, at my request selected, with much care, "for the use of students and young persons," a great number of leading and popularly-intelligible portions of Blackstone's Commentaries, which we prepared for publication. Of that work, a large edition appeared in the year 1836. Within the last year so great and sudden became the demand for the work, that it was necessary to reprint, *verbatim*, the former edition, and the reprint itself was exhausted within three months.

It is not unknown to many in the legal profession, that for nearly twenty years I have been laboriously engaged, at every interval of leisure, in preparing an edition of the entire Commentaries:—but so vast have been the changes effected, increasing latterly in rapidity, number, and magnitude, that I have been reluctantly compelled to give up the hopeless task; having 'toiled after' the Legislature 'in vain.' The labour of a whole long vacation, has several times been rendered useless, by the alterations effected in the ensuing session of Parliament. It is my intention, however, if life and leisure last, to write an original work, on a comprehensive, practical, and systematic plan, illustrating our laws in their newest phase, by those of

the United States, and of the Continent, and by the Civil Law.

When I came to consider how best to prepare the little work of 1836 for a new edition, and had scanned every one of the "Extracts" from Blackstone, so great proved to have been the ravages on the text, by changes in the law during the last twenty years, that I was nearly abandoning even *that* task, in despair. At length, however, and at the earnest recommendation of those for whom I entertain the greatest respect, I resolved to avail myself of some of my laborious collections for the former work; and that now offered to the public, is the result. Two-thirds of it consist of new matter; which, it is hoped, will be found a safe and useful incorporation with the text of Blackstone. Those portions of the latter which I was able to retain unaltered, are few: and like the others, required incessant vigilance, to avoid the retention of expressions and allusions inconsistent with existing law. Many portions of the text, after having repeatedly altered, I have been forced at length altogether to discard, substituting a new paragraph, and even chapter.

I must earnestly ask the forbearance of the considerate and learned reader, after all; for he alone can estimate the difficulties encountered in preparing such a work as the present. A single glance at the Table of Contents, will show him that they travel over almost every department of our Laws and Constitution; which have undergone organic changes of great magnitude, since the year 1831. This is the case with our Parliamentary and Municipal system: the Legislative, Judicial, Executive, and Fiscal departments: the Administration of Justice in our Criminal and Civil Courts, whether Superior or Inferior, whether of Law or Equity. The law of Pleading, Practice and Evidence, civil and criminal, is entirely remodelled: changes of corresponding magnitude have been effected in Conveyancing, the law respecting real and personal property, and trade and commerce. In short it may be said that

the legal fabric, slowly altered, from time to time, during a long series of ages, has been taken down and rebuilt within the last quarter of a century, and adapted to the exigences of the present enlightened age.

While affording, it is hoped, a clear and correct exposition of these great legislative changes and alterations, an attempt has also been made to present the essential doctrines of law, on some of the most important subjects, and most frequently involved in the affairs of ordinary life, *i.e.*: Contracts; Wills; Fraud; Slander; Libel; Malicious Prosecution; False Imprisonment; Principal and Agent; Husband and Wife; Parent and Child; Guardian and Ward; Master and Servant; Habeas Corpus; Homicide; Felony and Misdemeanor; Excuses for Crime. In these, and others which might be mentioned, it has been sought to present, in a condensed form, as it were, the essence of the law, in its latest judicial development, and, in matters of importance and difficulty, in the expressions, often choice and happy, of the judges. I wish also cordially to express my obligation to several of my brethren at the Bar, who have written very ably on various legal subjects, and whose language, deeming it better than any I could use, I have thankfully adopted, and acknowledged.—I have endeavoured to place the elements of legislation and jurisprudence on a sound basis, guided by the latest lights of moral and political science: and above all, constantly to exhibit, in broad relief, the Christian character of our jurisprudence.

I have also availed myself of the researches of modern historians and antiquarians, especially the valuable publications of the Record Commissioners, for the purpose of illustrating some, and correcting other long undisturbed portions of the Commentaries; and this often in consequence of suggestions made to me by that profoundly learned antiquarian, Sir Harris Nicolas.

Whatever may be the reception of this work by the

Profession of which it is my pride to be a member, and to whom I commit it with respectful deference, I beg to intimate, that it has been also my leading object to render the work popularly useful, for either private, public, or academical use: and for this purpose I have used as plain language as possible, and in every instance striven to exhibit in action, those *principles* on which leading rules of law are less obviously founded.

I can with truth say, in conclusion, that I have honestly done my best, to contribute a mite towards facilitating the study, by all classes, of the laws of our beloved and glorious country, in these eventful times,—the laws of A CHRISTIAN STATE, permitted by Providence to become so great among the nations of the earth. The hope of being in any considerable degree successful, has cheered many a long hour of labour and anxiety. And finally, in the words of our great master Lord Coke, "for a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence;" and to all my fellow countrymen, of every degree, I commend the noble *dictum* with which Blackstone closes his Commentaries:

"The protection of THE LIBERTY OF BRITAIN is a duty which we owe to Ourselves, who enjoy it; to our Ancestors, who transmitted it down; and to our Posterity, who will claim at our hands this, the best birthright and noblest inheritance of mankind."

INNER TEMPLE,
TRINITY TERM, 1855.

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INTRODUCTION.

THE contemplation and study of LAW, are solemnising and ennobling to one actuated by a right spirit: but this can never be, where Law is dissociated from Religion, which alone indicates the august original of LAW: revealing the Supreme Lawgiver, the Omniscient Maker, and final Judge of Man. That *by Him actions are weighed*,* is a declaration made by Himself, and to be received with awful reverence. *All things are naked and opened unto the eyes of Him with whom we have to do*; † who is not only beneficent, willing the happiness of his creatures, but just; finally rewarding every man according to his works, as tried by the eternal unwavering standard of right and wrong.

He has also vouchsafed to tell us, that He *made Man in His own image*, by which we may humbly suppose to be signified, our intellectual and moral nature: endowing us with the faculty of knowing Him; of perceiving the distinctions between good and evil; and of obeying or disobeying his commands, by virtue of the free will with which He has so mysteriously endowed us. Our nature is immortal, our destination eternity; our existence here, transient and

* 1 Sam. ii. 3. † Heb. iv. 13.

probationary.—Man, however, is a fallen creature. Almost the earliest exercise of his will was to choose evil rather than good, incurring, thereby, the just but not implacable displeasure of his Maker. His law he has *written in our hearts*: and when, our nature having become perverse and corrupt, the characters of that law had grown dim and obscure, He was graciously pleased to reveal it, in full distinctness. Thus the Divine Law is spoken of as Natural and Revealed; Christianity being a republication, and external institution of natural religion, containing an account of a dispensation of things not discoverable by reason: natural religion being thus the foundation and principal part of Christianity, but not in any sense the whole of it.*

Human laws, therefore, ought to be in conformity with the Divine law, their object being the regulation of our conduct towards each other, in this life, as fellow-citizens and neighbours; as it were fellow-travellers, or pilgrims, towards a common destiny, having interests, objects, hopes, and fears in common; being, in fact, brethren. In this aspect, law is indeed lovely; and from the hallowed lips of the Saviour of mankind, we learn, that love is the very keystone of our relations to our Maker, and each other. *Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength: thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets.* From these two precepts may be deduced the entire code of jurisprudence;† which has thus a vitality, lustre, and authority, not apparent to him

* Bishop Butler, Anal. of Religion, Part II., Chap. I.; *post* 20, *note*.

† *Post*, p. 2, and see Domat's Civil Law, Prelim. Treat. of Laws, Chap. I.

who regards it as a series of mere arbitrary enactments, expended upon the limited sphere of action afforded by this life only.—This being the holy and glorious fountain of humane, enlightened, and equitable laws, as regards alike the making, enforcing, and obeying them; let it be received as an axiom, that law and religion are in their nature inseparable. The attempt to dissever them would be absurd and nugatory: the vitality of law, the force of its sanctions, would disappear; the very foundations of its authority would be subverted.

Such being the source, origin, and object of law, the study of it cannot but be profoundly solemnising, and ennobling.

Law, again, is invested with interest from another affecting consideration—the amount of intellect and wisdom brought to bear upon the experience of all that has befallen the human race, in respect of conflicts on the subject of rights and duties, public and private. 'The science of jurisprudence,' says the illustrious Edmund Burke, 'is the pride of the human intellect; a science which, with all its defects, redundances, and errors, is the collected reason of ages, combining the principles of eternal justice, with the infinite variety of human concerns.' And another eminent person * of our own day has finely observed thus: 'There is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of wise men, through a long course of ages, withdrawing every case,

* Sir James Mackintosh, Discourse on the Study of the Laws of Nature and of Nations, p. 58.

as it arises, from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason; and gradually contracting, within the narrowest possible limits, the domain of brutal force and arbitrary will.'

Furthermore, let it be considered with what difficulties law undertakes to cope:—to deal with those who can, and those who cannot, comprehend its scope and object: with the virtuous, and the vicious; the Godly, the Godless; the obedient, the disobedient; the covetous, the generous; the gentle, the ferocious; the honest, the dishonest; the forbearing, the exacting; the base, the noble; the ignorant, the wise; the rich, the poor. To deal, moreover, with all these diversified dispositions, these modifications of humanity, authoritatively, and evenly: neither unduly extending, nor restraining, freedom of action. Its office is, in short, to deal, coercively, with all those in whose breast exists that interminable contest between Liberty and Authority, the existence of which is attested by the condition of legislation and jurisprudence. Looked at from this point of view, Law and History are seen as twin-sister sciences, each deriving an interest from, and reflecting light upon, the other; of which a striking instance is afforded towards the close of this epitome of the laws of England.* It may with truth be said, moreover, that those particular laws have to deal with a people signally sensitive and exacting in respect of their rights, but withal resolute, frank, and generous; of inflexible determination; of boundless daring and resource; but still characterised by attachment to their institutions, love of justice, reverence

* *Post*, pp. 680–683, *note*.

for religion, and a desire, backed by sublime and systematic efforts, to diffuse Christianity throughout the whole earth.

Surely the laws of such a people are worthy of being studied, by strangers, with respect and interest, but by that people themselves, with deep and affectionate attention, in order to comprehend their scope, and enter into their spirit; to pay them a hearty and enlightened obedience; and appreciate the necessity or danger, alike of altering them, or retaining them unaltered. Sir William Blackstone, nevertheless, at the very opening of his Commentaries,* declares that 'the Science of the Laws and Constitution of our country, is a species of knowledge in which the gentlemen of England have been more remarkably deficient than those of all Europe beside.' This was a severe reproach, but not now, it is to be hoped, so just as when uttered; and if that hope be well founded, the result has been greatly due to himself; for the publication of his far-famed Commentaries, marked a new era in the study of English Jurisprudence. One of his most stern and unrelenting critics, himself a jurist† of great eminence, yet with views fundamentally opposed to those of Blackstone, was constrained thus to speak of the style in which the Commentaries were written. 'He it is, who first of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman; put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office, and decked her out to advantage from the toilette of classic erudition; enlivened her with meta-

* *Post*, p. 4, Chap. II.

† Bentham, Fragment on Government, Pref. xxxix. (published A.D. 1776.)

phors and allusions, and sent her abroad, in some measure to instruct, and in still greater measure to entertain, the most miscellaneous, and even the most fastidious societies. The merit to which, as much perhaps as any, this work stands indebted for its reputation, is the enchanting harmony of its members.' In the vivid figurative language, again, of Lord Avonmore, 'He it was that first gave the Law the air of a science. He found it a skeleton, and clothed it with life, colour, and complexion. He embraced the cold statue, and by his touch it grew into youth, health, and beauty.'

These eulogies are just. The language of Blackstone is equally pure, elegant, and forcible; his arrangement, for which, however, he was greatly indebted to Sir Matthew Hale, is lucid and felicitous; and as an elementary expositor, he may perhaps be said to be unrivalled. 'To me,' said, in the year 1825, his learned and accomplished editor, Mr. Justice Coleridge, 'the Commentaries appear in the light of a national property, which all should be anxious to improve to the uttermost, and which no one with proper feeling, will meddle with inconsiderately. It is easy to point out their faults; but it requires, perhaps, the study necessarily imposed upon an editor, to understand the whole extent of praise to which the author is entitled. His materials should be seen in their crude and scattered state; the controversies examined, of which the sense only is shortly given; what he has rejected, what he has foreborne to say, should be noted, before his learning, judgment, taste, and, above all, his total want of self-display, can be justly appreciated.' This is discriminating and high praise, in which those most

thoroughly acquainted with the Commentaries, will be the readiest to concur.

These Commentaries introduced large classes of society to a knowledge of the laws of their country, as to a *terra incognita;* of which it gave them so attractive an account, and so full and accurate a chart, as to render ignorance and indifference any longer, inexcusable. Their author professed to supply such knowledge, however, for only the upper classes of society; for the nobility, gentlemen of independent estates and fortune, members of the legislature, and of the learned professions—these last, moreover, being spoken of as 'persons of inferior rank;' while all others appear summarily dismissed, as 'persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move.'* Unless by these, he intended to designate none but the very humblest members of society, he altogether omitted from consideration the great middle classes, whose subsequent growth in intelligence, power, and importance has operated a silent revolution. The topics which he selected to show the necessity of a competent degree of legal knowledge, were equally applicable to the middle classes of even that day,—merchants, manufacturers, tradesmen, shop-keepers, and artizans. Such considerations, however, tell with tenfold force in the case of the middle classes of our day. In their hands is now a large proportion of the property of the country; they have to acquire and alien it, by contract, or by will; and surely thereby acquire an interest in knowing something of at least such branches of the law as may enable them to act in doing so, with safety.—From

* 1 Bl. Com., 6, 7.

the middle classes, are selected those juries to whom are entrusted, our properties, liberties, reputations, and even lives; but above all, they are now largely entrusted with the power of self-government, and become the depositories of vast political power, through the recent remodelling and extension of our municipal and parliamentary systems; and the humbler classes are also raised in the social scale, by the wide diffusion of education. As for our criminal law, affecting all alike, some acquaintance with its leading doctrines the Commentator, himself, properly declares * to be 'of the utmost importance to *every* individual in the State; since no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not, at some time or other, be deeply interested in such knowledge.' A moment's cool reflection on the utter instability of human affairs and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man against a delusion of this kind.

All these constitute unanswerable reasons for desiring to see law made, in the present day, *popular*: that is, accessible, intelligible, and interesting to the mass of society. It affects, as it ever must, every man, woman, and child, whether sensible of it or not, directly and personally, by conferring or abridging some right, imposing some obligation, or subjecting to some penalty. The establishment of local courts, for instance, brings law home to every man's door, as applicable to the transactions of every day

* *Post*, p. 575, Chap. LX. The Commentator is adopting the language of Sir Michael Foster (*Preface to his Reports* p. xxiv.) whom he justly tyles a very great master of the crown law.

life, and business, involving even the smallest amount of property; and this facility of enforcing, or resisting, claims suggests of itself the advantage of acquiring some general notion of legal rights and liabilities.—Thus every consideration of individual and private, and of the public interest, the administration of justice, and the exercise of political power and of self-government, concurs to show the necessity and advantage of the people at large becoming acquainted with the nature of those laws and institutions under which they are living, as members of a free Christian State. But how greatly is that necessity enhanced, in an age of such interference with those laws and institutions, as is evidenced by every page in this volume;—changes, some of which may directly and personally, though very unexpectedly, affect an individual in any station of society, unaware, though he might, with moderate exertion, have become so, of the existence of those which have affected his own private or public relations.

Whether these changes prove to be for good or for evil, every man is a party to them, who, by exercising his parliamentary franchise, sends a representative into the House of Commons, to make, or withstand, those changes: and if such be the responsibility of the elector, what must be that of the elected? What shall excuse his temerity, wickedness, and folly, in presuming to take part in altering laws and institutions, of the nature of which he is utterly ignorant, but with which are bound up the welfare of the whole country, and the interests of our posterity! How can such an one venture to change, or resist change? He puts the hand of an Uzza to the ark* of our liberties.

* 1 Chron., xiii. 10.

To protect us against a perilous tendency to blind and indiscriminate change; against an inclination to change for the sake of changing, unsettling equally men's minds, and our institutions, innovation at length rushing headlong into revolution: it is requisite that the true scope and character of these institutions should be really and distinctly understood, by those who desire, and those who deprecate, those who effect and those who resist alterations in them; that our great landmarks be kept ever in sight; that we 'walk in the light of the Constitution;' cherishing as ardent a loyalty to the crown, as watchful love for the liberty of the subject; persuaded that each is the bulwark of the other, and that our institutions are adjusted, with an exquisite and complex nicety of arrangement, to the preservation of both: that adjustment having taxed the highest intellect, and cost the richest blood, of those who have gone before us. It ought to be remembered, moreover, that no great change can be effected, without sooner or later necessitating others, the effect of which may be far other than could have been desired, had it been foreseen. 'In politics,' Dr. Paley well observes, 'the most important and permanent effects have for the most part been incidental and unforeseen: a proposition inculcated for the sake of the caution which teaches, that changes ought not be adventured upon without a *comprehensive* discernment of the consequences,—without a knowledge as well of the remote tendency, as of the immediate design. Incidental, distant, and unthought-of evils or advantages, frequently exceed the good that is designed, or the mischief that is foreseen.—A sober comparison of the Constitution under which we live, not with models of

speculative perfection, but with the actual chance of getting a better, will generate a political disposition equally removed from that puerile admiration of present establishments, which sees no fault, and can endure no change; and that distempered sensibility which is alive to perceptions of inconveniency only, and is too impatient of being delivered from the uneasiness which it feels, to compute either the peril, or expense, of the remedy.' * These wise, and practical cautions are peculiarly apposite to the temper and circumstances of the times; when it is rightly felt to be the duty of enlightened statesmanship, not to shrink from a proposed change, merely because of its startling boldness, but to consider the effect of others, already accomplished, and which have rendered necessary that meditated. But how can that consideration be of the least avail, unless founded on accurate and extensive knowledge? The necessity of these reflections is but too frequently attested, by the state of our statute book, even if regard be had to only the manner of our legislation: the obscure wording, and inconsistent enactments of which, tax judicial acuteness in vain. We may in this respect, as in many others, take a lesson from the ancient Romans; who cultivated legislation, as a science, with so much care and refinement, that they had laws to instruct them how to make laws.† The mention of that illustrious people, may remind us of another point in which it were well if we resembled them,—their care to familiarise youth with the elements of their laws.

* Moral and Political Philosophy, Book VI., Chap. VII.

† The *Lex Licinia*, *Lex Ebutia*, *Lex Cæcilia*, *and Lex Didia*, provided checks, that the law should not unintentionally contain any particular personal privileges, or weaken the force of former laws, or be crowded with multifarious matter. *Gravina*, Lib. I., c. xxix. 1 Kent Com., 238, *note* (*a*).

The very children were made, from their earliest years, familiar with the maxims and *formulæ* of laws, as our children, in these later and more enlightened ages, with nursery rhymes. Cicero says to his brother, 'from the time of our boyhood, we learnt "If a man sue you at law" (*Si in jus vocat*) and other laws of that kind, by rote.' And again—'You know what follows: for when we were boys, we learnt the Twelve Tables like a familiar rhyme.' And it was the office of the higher class of Romans, to expound, to their clients, the application, and interpretation of the laws.* But how is this with Englishmen? How many of the youth of even our nobility or gentry, though perhaps promising scholars at our most distinguished public schools, know a single line of any of the three great fundamental Acts, which Lord Chatham boldly designated as the Bible of the British Constitution?† What could one of these hopes of England answer, to an enquirer, concerning the *Habeas Corpus* Act, the Act of Settlement, the Doctrine of the Hereditary Right to the Throne, the Royal Prerogative, the Constitution of Parliaments, the State of the Suffrage, Trial by Jury, the Connection between Church and State, the relation between our Civil and Military laws, and very many other topics which might be mentioned? He may be well versed in mythological and metrical mysteries, the niceties of grammatical construction, and familiar with ancient history, antiquities, and geography; but why should the glorious book of the British Con-

* Cic. De Ll. ii., 4; 23; Elements of Morality, by Dr. Whewell, Book IV., Ch. VI., § 764.

† *Post*, p. 100, Chap. XII. See Creasy on the Constitution (p. 5), a recent and excellent performance.

stitution, be to him a sealed book? If he would but open its leaves, he would find them richly illuminated by the goodness and greatness of those who, under Providence, have raised this country to its present height, and would conjure their descendants, especially in these critical times, not to neglect or forget its solemn and glorious teachings. God forbid that anything should induce the high-spirited youth of England to undervalue the refining and enriching results of classical culture, for which if the opportunity be lost, it is gone irrecoverably. That great ornament of our law and literature, Sir William Blackstone, has left in these respects, as in others, a bright example for all time; and some little account of his career cannot be here inappropriate.

It is delightful to record, that he was a man of spotless and exemplary propriety of conduct, in all the relations of life, public and private: modest, courteous,—though, it would appear, of a somewhat sensitive and irritable temperament,—sincere, philanthropic, and a true Christian; upright, discreet, and learned as a judge; temperate, and vigilant as a senator; as a country gentleman indefatigable in his attention to local duties and interests. He was zealously associated with the illustrious Howard, in reforming the prison system of his day. Gaols were then shocking scenes of debauchery and contamination, to culprits old and young; and the immediate result of the exertions of Blackstone and Howard, was the passing, in the year 1779, of an Act of Parliament (stat. 19 Geo. III., c. 74) for the establishment of penitentiary houses near the metropolis, in order 'to seclude the criminals from their former associates; separate those of whom hopes might be entertained from those who were desperate; teach them useful trades; accustom them

to habits of industry; give them religious instruction; provide them with a recommendation to the world, and the means of obtaining an honest livelihood, after the expiration of the term of their imprisonment.' In one of his charges to a grand jury, he thus, with cogent eloquence, expatiated on the principles and results of an improved system, in words worthy of being honourably associated with his name.

'In these houses the convicts are to be separately confined during the intervals of their labours; debarred from all incentives to debauchery; instructed in religion and morality; and forced to work for the benefit of the public. Imagination cannot figure to itself a species of punishment in which terror, benevolence, and reformation are more happily blended together. What can be more dreadful to the riotous, the libertine, the voluptuous, the idle delinquent, than solitude, confinement, sobriety, and constant labour? Yet what can be more truly beneficial? Solitude will awaken reflection, confinement will banish temptation, sobriety will restore vigour, and labour will beget a habit of honest industry; while the aid of a religious instructor, may implant new principles in his heart, conducing when the date of his punishment is expired, to both his temporal and eternal welfare. Such a prospect as this, is surely well worth the trouble of an experiment!'

Sir William Blackstone was a man of refined taste, of no inconsiderable imaginative power, of elegant and extensive scholarship, of vigorous understanding; well versed in the doctrines of law, familiar with its history, and as an elementary expositor of our laws, charming and peerless.

He was born in Cheapside, on the 10th July, 1723, at the house of his father, who was a citizen and silkman. He died

several months before the birth of a son destined to be so distinguished; and who was also, before he had attained his twelfth year, deprived, by death, of his mother. This double bereavement, apparently so injurious to his prospects in life, was attended with consequences of quite a different character; for he immediately received the invaluable and unremitting care and attention of a maternal uncle, one Mr. Thomas Bigg, a surgeon in London, who gave his youthful orphan nephew the utmost benefits that education could confer. When seven years old, he was put to the Charter House, admitted on the foundation, and became head boy in his fifteenth year: having conducted himself with such propriety, made such progress in his studies, and evinced so much talent, as justified his being sent, at that early age, to Oxford, where he was entered a commoner of Pembroke College. Before he quitted school, he obtained a gold medal for some verses on Milton. At Oxford his attention to classics, logic, and mathematics was unremitting, but not exclusive; for at the early age of twenty he had completed, for his own use only, a little treatise entitled "Elements of Architecture;" thus early indicating that inclination and faculty for elementary exposition, by which he was afterwards so splendidly distinguished. He chose the bar for his profession, and was entered on the 20th November, 1741, at the Middle Temple, where he gave himself to reading law; not, however, without a pang bidding adieu to the more congenial pursuits of taste and poesy, if we may infer as much from some verses which he then wrote, entitled "The Lawyer's Farewell to his Muse." "Shakespeare," he says pathetically—

> Shakespeare! no more thy silvan son
> Nor all the art of Addison,

Pope's heaven-strung lyre, nor Waller's ease,
Nor Milton's mighty self, must please!
Instead of these, a formal band
In furs and coifs around me stand,
With sounds uncouth and accents dry
That grate the soul of harmony.
Each pedant sage unlocks his store,
Of mystic, dark, discordant lore;
And points with tottering hand the ways
That lead me to the thorny maze.
There, in a winding close retreat,
Is Justice doomed to fix her seat;
There, fenced by bulwarks of the law
She keeps the wondering world in awe,
And there from vulgar sight retired
Like Eastern Queens is much admired.
Oh let me pierce the secret shade,
Where dwells the venerable maid!
There humbly mark, with reverent awe,
The guardian of Britannia's law;
Unfold with joy her sacred page
(The united boast of many an age,
Where mixed, though uniform, appears
The wisdom of a thousand years)
In that pure spring the bottom view,
Clear, deep, and regularly true,
And other doctrines thence imbibe,
That lurk within the sordid scribe;
Observe how parts with parts unite
In one harmonious rule of right,
See countless wheels distinctly tend,
By various laws to one great end;
While mighty Alfred's piercing soul
Pervades and regulates the whole.

Then welcome business, welcome strife,
Welcome the cares, the thorns of life,
The visage wan, the pur-blind sight,
The toil by day, the lamp by night.
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,
For thee fair *Justice*, welcome all!

He remained always attached to letters; and some of his

notes on Shakespeare, inserted by Mr. Stevens, in his edition, show how sensible was Blackstone of the beauties of his favourite bard: but he did well to reflect on the jealous and exacting character of the profession which he was entering; for in England, a lawyer ought to regard genius as, indeed, a precious and glorious gift from God, but fraught with death to the professional hopes of him who permits himself to be known as its possessor! instead of keeping it, secret and guarded, like stolen treasure.—In the year 1743 Mr. Blackstone was elected into, and in the ensuing year admitted actual Fellow of, All Souls' College; thenceforth residing alternately at his college, and in chambers in the Temple, in order to attend the courts. On the 12th June, 1745, he commenced Bachelor of Civil Law, and on the 28th November, 1746, was called to the bar, in his twenty-third year. Being entirely destitute of any pretensions to eloquence, and of a reserved and ungainly temperament and address, and without friends or connections likely to assist him, he made no progress, except in "hiving wisdom with each studious year," which became afterwards to him of such signal use. Obtaining some little offices in the University, he soon showed a peculiar aptitude for business: and in May, 1749, he was elected Recorder of Wallingford, on the resignation of his uncle.* In the ensuing year he commenced Doctor of Civil Law, and thereby became a member of Convocation; in which enlarged sphere of action he made the University sensible of his valuable services, in attending sedulously to her interests.

* Recorders are, since the Municipal Corporation Act, appointed by the Crown (*post*, p. 404,) by warrant under the Sign Manual.

Seven years afterwards, constant but fruitless attendance in the Courts of Westminster, drove him back in despair to Oxford, where he resolved to devote himself to academical life, enlivened with provincial practice at the Bar. Having previously prepared himself for the undertaking, he now commenced the delivery of lectures on the Law; which immediately became popular, and were attended by the most distinguished youth in the University, for whose use he had published, a year previously, an "Analysis of the Law." In 1757 he was elected, by the surviving visitors of Michel's new Foundation in Queen's College, into that body; and unanimously, on the 20th October, 1758, Vinerian Professor, being the first appointed under the recent will of Mr. Viner. He now devoted himself with greater system and ardour than ever, to the scientific study of the law; and his lectures were received with such applause as attracted royal notice, so that he was desired to read them to George III., when Prince of Wales. This honour he was obliged respectfully to decline, as inconsistent with due attention to his class in the University; but sent copies of the lectures for the Prince, who evinced a graceful consideration. In June, 1759, he bought chambers in the Temple, and resumed his attendance on the courts at Westminster, resigning his college appointments, but continuing to read his lectures, except during the London Law Terms. Shortly afterwards he published two small works on legal subjects, raising his reputation as a practical lawyer; in 1761, was returned to Parliament for the since disfranchised borough of Hindon, in Wiltshire; shortly afterwards could afford to decline the office of Chief Justice of the Court of Common Pleas, in Ireland; and received,

on the 6th May of that year, a Patent of Precedence, to rank as Queen's Counsel. These well-earned marks of distinction, and his celebrity as a writer, at length led to his acquiring such considerable practice at the bar, that on the 5th May, in the year last mentioned, he ventured upon marrying a lady, with whom he lived in unbroken happiness for nineteen years, which were, as he declared, "the happiest part of my life." On the 28th of the ensuing July, he was appointed Principal of New Inn Hall. In 1763 he was appointed Solicitor-General to the Queen Consort, and chosen a Bencher of the Middle Temple. Many incorrect and surreptitiously-obtained copies of his lectures having got into circulation, in Ireland, he himself, in November, 1765, in self-defence, printed the first volume of his celebrated Commentaries; the remaining three volumes following during the four succeeding years. In 1766, he resigned his professorship, and the office of Principal of New Inn Hall. In 1768, he was returned to Parliament for the borough of Westbury, and took part in the debates relating to the election of John Wilkes, which led to his being attacked by, among others, the author of Junius, in terms of extreme and studied acrimony. His professional reputation was now so high, that in 1770, he was offered the post of Solicitor-General, on the resignation of Mr. Dunning; but declined it, feeling that his constitution was too feeble for the combined parliamentary and professional exertions and fatigues of that office. On the 16th February of that year, after having been offered a seat on the Bench of the Court of Common Pleas, and actually kissing hands on the appointment, before the passing of his patent, he gave way to the wish of

Mr. Justice Yates to retire to that Court, from the Queen's Bench; and Sir William Blackstone was appointed in his stead, and resigned the Recordership of Wallingford: but Mr. Justice Yates dying on the 7th of the ensuing June, Mr. Justice Blackstone was restored to his original seat in the Common Pleas.

He had now reached his long sighed-for *otium cum dignitate*; and during the intervals of judicial duty, which he discharged sedulously, he enjoyed, at a small seat which he had purchased at Wallingford, soon after his marriage, the luxury of literary leisure and refreshing country occupation; and exercised himself with those philanthropic efforts to which allusion has already been made. His tenure of such enjoyment, however, was not long. His constitution, never strong, and weakened by severe early study, suffered from diseases aggravated, if not induced, by an unhappy disinclination to exercise; and he became a martyr to gout, vertigo, and a morbid corpulence. On returning to London for the duties of Hilary Term, in the year 1780, he was seized with a fresh attack of vertigo, inducing a drowsiness and stupor which baffled medical aid; and after lying some days insensible, he expired on the 14th February, 1780, at the comparatively early age of fifty-seven, universally respected: having given an impulse to the study of the laws of his country, such as they had never known before, and continues to this day. He was buried, according to his direction, in a vault which he had built for his family, in the parish church of St. Peter, Wallingford; and, at his request, his neighbour and friend Dr. Barrington, then bishop of Llandaff, performed the funeral service.

Sir William Blackstone was exact, punctual, and rigidly decorous in his habits; a severe economist of his time, and impatient with those who were otherwise. His converse was cheerful and instructive; he was firm in his friendships, of devoted affection to his family, unostentatiously charitable to the poor, and a zealous yet tolerant member of the Church of England. Timid and shy in his manners, and short-sightedness occasioning a contraction of the brow which gave him an air of sternness, he was often regarded as not of an amiable temper; but this was, "an unmerited imputation" (says one who had known him well) "for he had a heart kind and benevolent as ever man possessed." His countenance, if we may judge from pictures, was not uncomely, and wore a thoughtful, grave, judicial expression.

Such was, personally, Sir William Blackstone, — such his character and career; and the contemplation of them cannot fail to prove interesting and instructive to the student,—to all who value superior powers virtuously and successfully directed to the service of one's country, and especially in expounding, illustrating, and rendering attractive the study of her laws. To overvalue, however, is at least as wrong as to undervalue, these far-famed Commentaries, as they were left by their author. It would be difficult to number the multitude of persons, especially members of the legal profession, whom they have laid under incalculable obligations, as leading them through the rugged fastnesses, and cutting for them, through the thorny thickets, of jurisprudence, a straight path, even bordered with flowers to delight the eye in passing; but too much must not be expected of a work, which there is no evidence that he contemplated becoming one of authority. He takes

care, on the contrary, to repeat, emphatically, at the close of the Commentaries, that they were "rudiments originally compiled for the use of students:" * and though such an admirable compilation was never presented to the English student before, it has its faults, often of execution, and sometimes of tone, which it has been diffidently attempted to correct, in the Epitome now presented to the reader.

When Blackstone commenced his noble undertaking, he had scarcely attained his thirty-fifth year, and did not possess the matured and masterly knowledge which he had acquired before its close. The earlier portions are pervaded by what may perhaps be considered an undue courtliness of strain; which, however, may be explained by his laudable anxiety to enlist those higher classes of society, to which his auditors principally belonged, in favour of the object to which he had so disinterestedly devoted himself, of *re-establishing* in the University, the study of the Common Law. It was these earlier portions, also,—touching gracefully, but not always, it is feared, satisfactorily, on many moot points of ethics and political law,—which principally excited the acrimonious criticisms of which he complained in the Postscript to the Preface, and particularly those of Jeremy Bentham. It would appear as if Blackstone had here rather hastily adopted some portions of the commencement of the "Esprit des Lois" of Montesquieu; and has fallen into the use of expressions at variance with the more exact and consistent nomenclature of modern jurisprudence, besides apparently sanctioning views which he would have repudiated. Various portions of the Commentaries are more-

* *Post* p. 656.

over pervaded by a tone of optimism, which has been often and strongly objected to, as not consistent with reality, and therefore calculated to mislead the learner, and also, aided by the writer's great name and fascinating style, prevent improvement. Of this he seems to have been himself from the first aware; for in his original edition he speaks thus —'This is the *spirit* of our constitution. Not that I assert that it is, in fact, quite so perfect as I have here endeavoured to describe it.'* In one of his later editions, apparently as if pressed by the animadversions which he had called forth, he appended the following note to the word "perfect:"—'The candid and intelligent reader will apply this observation to *many other parts* of the work before him; wherein the constitution of our laws and government is represented as approaching nearly to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time, and a loose state of national morals, have too great a tendency to produce. The incurvations of practice are then the most notorious, when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted, or destroyed it.'* This is elegantly expressed, but appears ingenious, without being satisfactory. Its apologetic character is evident; and may warrant the opinion that if he had had the opportunity, he would have re-cast many portions of his Commentaries, on finding the objections made to them, as based on a system of optimism. 'This celebrated production,' it has been said, 'must be regarded not so much as a philosophical investigation into the

* 1 Comm. 172, *note* (*n*).

grounds and merits of the English laws and constitution, as an elegant exposition and defence of an existing system. Whatever he found instituted, it was his purpose to support and eulogise; and consequently we are rather made acquainted with the 'legal reasons' of what is established, than instructed in the general principles of national legislation. This mode of treating the subject may be, in some degree, useful, by conveying a due notion of the grounds on which governments and usage have proceeded, but will do little to advance the mind of a nation, and often a great deal to nurture prejudices and impede amelioration.' It should, however, be remembered, in justice to Blackstone, that the tone of feeling and opinion of his day, was at variance with that of ours; that he prepared his Commentaries, not as a set institutional work, but, *bonâ fide*, as lectures to a class in a University; and afterwards published them, as we have seen, and as he stated at the time, simply in defence of his reputation against piracy. There are many traces in the Commentaries, of his having, in successive editions, striven to profit by strictures, however unfriendly; and in addition to this, he put in the general plea or salvo, which has been just laid before the reader. It would, however, be the height of injustice to this eminent man, to lose sight of the many indications he has given us, though with characteristic diffidence, of a humane and enlightened spirit, beaming, faintly but steadily, through the thick mists of intolerance, cruelty, and mistaken policy, which subsequent times have gone so far to dispel.

It is considered that the proper method of preparing for the public such a work as the present, is to conceive, if

possible, how Sir William Blackstone would now look at the edifice of our laws and constitution, after a century's legislation, giving him credit for being himself imbued with the spirit of an age entitled to be regarded as one of progress and enlightenment. It has been endeavoured to do this in the present volume; which may be regarded as a SYNOPSIS of our laws and constitution, as they stand in the year 1855. More is not to be expected; but to effect as much has been faithfully attempted. It may form a companion volume to *the original Commentaries, as left by Sir William Blackstone,* which ought to find a place in the library of every statesman, lawyer, and gentleman, for a century to come; not as a matter of mere antiquarian interest, but of high legal and historical value. For many years, rights must be determined, by our courts, in conformity with rules of law which have been changed, but not with retrospective effect; and the student and practitioner would feel seriously at a loss, if the lucid pages of Blackstone were not at his command. When the illustrious contemporary of Blackstone, Lord Mansfield, was asked to point out the books proper for the perusal of a student of the law, that great man bore this emphatic testimony to the value of the Commentaries:—'Till of late I could never, with any satisfaction to myself, answer that question; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss. There, your son will find analytical reasoning, diffused in a pleasing and perspicuous style. There, he may imbibe imperceptibly the first principles on which our excellent laws are founded; and there, he may become acquainted with an uncouth, crabbed author, Coke upon Lyttelton, who has disappointed

many a tyro, but who cannot fail to please in a modern dress."*

The Commentaries continue to be cited in all our courts with deference and respect, and are often referred to in Parliament, and by public writers. Whatever, therefore, be the merit and value, and they are great, of later editions fully annotated, in conformity with the state of the law at the dates of their respective publication; one of the original un-annotated † editions, which may at present be obtained at the cost of a few shillings, is recommended to even the lay reader, but very strongly to the student of the law. Let him beware of what he slights and stigmatises as *obsolete* law: that which may still have potent vitality, or at all events illustrate that by which it has been superseded. It is with these views, that in the volume now submitted to the public, reference is made, at the head of the chapters, to those portions of the text of Blackstone, on which they are founded. Those chapters, moreover, are designedly short; but it is not to be supposed that they are not pregnant with matter sedulously condensed, and entitled to deliberate consideration.

In this work may be seen, it is hoped, faithfully delineated, the carefully defined relations between,—the Sovereign and the Subject; between the Church and the State; the Established Church, and those forms of religion held by persons who do not join in her communion,—Dissenters, Jews, and Roman Catholics; the nature of the union between the Protestant Church, and the State; of the

* Holliday's Life of Mansfield, p. 89.

† Stress is laid on this word, for the obvious reason, that annotation, based on non-existent law, is delusive, and therefore dangerous.

United Church of England and Ireland; of the Church of Scotland; of the Legislative, Judicial, and Executive Departments of the State; of the relations between the Civil, Naval, and Military Estates. These may be regarded as the ORGANISATION of our complex Constitution,—the machinery, so to speak, by which it works out its results,—the preservation and action of our civil and religious liberties; that happy and noble compromise, in a word, between the antagonist forces of liberty and authority, the terms of which are settled with punctilious precision, and indicated by the words the CONSTITUTIONAL MONARCHY of England.

In this is involved a multitude of topics of the highest interest and moment, with reference to our domestic, colonial, and foreign economy and relations; and that vast body of rules which, affecting every individual in respect of his person and his private rights and duties, may conveniently be regarded as constituting the body, or substance, of THE LAW. The elements, or mere rudiments of that law, are here laid before the reader in such a way as to exhibit the REASONS and POLICY on which those legal rules are founded, which a man's conscience and understanding are concerned in observing.

Patriotism, says Lord Bolingbroke, must be founded in great principles, and supported by great virtues; and loyalty, observes the author of Junius, is, in the heart and understanding of an Englishman, a rational attachment to the Guardian of the Laws. That, however, is little better than lip loyalty, and that patriotism removed but a degree from pretended, which is consistent with willing ignorance of the nature and attributes calling either

into existence. What love is that, which neither knows, nor cares to know, anything about the object of it?—It would, however, be paying but a poor compliment to either young or old, in this great, free, and enlightened country, to importune them to study her laws and institutions. He who is ignorant of them, may rest assured that he knows nothing of the national character. He is not identified, in sympathy or spirit, with those who have gone before us, and stamped the glorious impress of their greatness and virtues upon the institutions which they have bequeathed to us. We cannot, indeed, afford to indulge ignorance, in this keen and exacting age; when our institutions are subjected to so piercing a scrutiny as they never underwent before, owing to the diffusion, among all classes, of knowledge, and political power. Every father should enjoin on his son, not only the necessity, but vast advantage, of early acquiring a knowledge of the laws under which he lives; and this alike to promote the welfare of his country, and his own advancement, if ambitious of obtaining honour and distinction at her hands.

And as for those who undertake the study of the law as a profession, many and weighty are the reasons for addressing themselves to it with redoubled energy. Never was it so absolutely indispensable, as now, to study law systematically, and master principles; in order to avoid being overwhelmed by changes of detail and administration, and steer through them with safety and comfort. He who does not pursue this course, will find himself tossed about, without rudder or compass, on a wild sea of change.

Let the student reflect also on the dignity of the study upon which he is entering. Even though Providence should see fit to withhold from him the prizes of earthly

distinction, he is invigorating his intellect by contact with the accumulated intellect and wisdom of ages, and purifying and elevating his soul, by contemplating the eternal principles of justice, and HIM from whom they emanate. The pangs of disappointment are allayed by such considerations, which dignify even failure. One thus inspired, may be said, as it were, to breathe, in fleeting time, the atmosphere of eternity, for which his higher nature is being fitted, every day, more consciously. He, however, for whom a different lot is ordained, will study, practise, expound, and administer law, in a high spirit, treating himself, and all with whom he is concerned, as dealing with a legislation and jurisprudence essentially Christian. He who does not feel thus, and is indifferent to such considerations, is in danger of degenerating into an empiric and a trickster, or becoming at best a mere mercenary in the service of the law.

And as for those who aspire to the splendid responsibilities of public life, and to occupy seats in the legislature of this vast and at present mighty empire, let them ponder well the wise words of Lord Bacon.

'And for matter of policy, or Government, that learning should rather hurt than enable thereunto, is a thing very improbable. We see it is accounted an error to commit a natural body to empiric physicians, which commonly have a few pleasing receipts, whereupon they are confident and adventurous, but know neither the causes of diseases, nor the complexions of patients, nor peril of accidents, nor the true method of cures. We see it is a like error to rely upon advocates or lawyers, which are men only of practice, and not grounded in their books; who are many times easily

surprised when matter falleth out beside their experience, to the prejudice of the cause they handle. So by like reason, it cannot be a matter of doubtful consequence, if States be managed by empiric statesmen not well mingled with men grounded in learning.'*

And, finally let the youth of our higher classes, enter upon the study of our laws, influenced by the inspiriting exhortation of the Emperor Justinian, in commending his Institutes to the noble youth of his dominions:—'Receive, then, these our laws, and address yourselves at once to the study of them, with cheerful energy; showing yourselves such proficients, that having thoroughly mastered them, you may justly cherish the brightest hopes of bearing a part in the government of your country, and acquitting yourselves, in offices which may be entrusted to you, with honour.'†

* *Advancement of Learning*, *Works*, vol. ii., pp. 16—17.

† "Summâ itaque ope, et alacri studio, has leges nostras accipite: et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempublicam, in partibus ejus vobis credendis, gubernari." Justin. in Proem. Inst. (dated 21st November, A.D. 533.)

[The reader is requested to observe, that those portions of the text which are enclosed in brackets,—thus [ ], —are new matter. The rest is that of Sir William Blackstone; but even then, necessarily varied, from time to time, to avoid the retention of expressions and allusions inconsistent with existing law. For the satisfaction, however, of readers wishing to refer to the original text of the Commentaries, and who are strongly recommended to do so, reference is made to the corresponding portions of it, at the head of every chapter that is not entirely new.]

BLACKSTONE,

SYSTEMATICALLY

ABRIDGED, AND ADAPTED TO THE EXISTING LAW AND CONSTITUTION.

CHAPTER I

CHRISTIAN CHARACTER OF THE LAWS OF ENGLAND.

[It ought to be ever borne in mind, by those who make, who expound, who administer, who study, and who obey the Laws of England, that they are the Laws of a Christian State: laws based upon Christianity, and throughout, supported, and enforced, by its sublime sanctions. In the judicial * language of Sir Matthew Hale, 'Christianity is parcel of the laws of England; and therefore, to reproach the Christian religion, is to speak in subversion of The Law.'

[A thousand years ago, King Alfred compiled his Doom-Book, a little summary of the laws, which is not lost, as Blackstone presently states,† but extant:‡ and at the head of it stand the Ten Commandments, followed by many of the Mosaic precepts, with the express and solemn sanction given them by our Saviour, in the Gospel, *Think not that I am come to destroy the law, or the prophets; I am not come to destroy, but to fulfil.* § After quoting the Canons of the

* Taylor's Case, 1, Ventris' Rep., 293. † *Post*, p. 44.

‡ It may be seen, in both Saxon and English, in "The Ancient Laws and Institutes of England," published by the Record Commissioners, vol. i., pp. 45—101. § Matthew v. 17.

apostolical council at Jerusalem,* Alfred refers to the Divine commandment, *As ye would that men should do to you, do ye also to them,*† adding, "from this one Doom, a man may remember that he judge every one righteously; he need heed no other Doom-Book." A noble and affecting incident this, in the history of our laws: which, though since swollen into an enormous bulk and complexity, and fed from many sources, still bear the same relations to religion, which we observe in the rude and simple elements of those laws, in the days of our illustrious Alfred. And, indeed, whoever will reflect reverently upon the Ten Commandments, so devoutly placed by Alfred at the head of his code, will find in them a wondrous and awful comprehensiveness, embracing every condition of humanity. Moreover, it is fitting for the Christian jurist to meditate, reverently and profoundly, on a particular passage ‡ in the New Testament; where we find it recorded by the hand of Inspiration, that one of the Pharisees, *which was a lawyer, asked* the Saviour of Mankind *a question, tempting him; and saying, Master, which is the Great Commandment in the Law? Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets.* From these two precepts, thus divinely enunciated, enjoining on us the love of our Maker, and the love of our Neighbour, may be deduced the entire code of Christian jurisprudence; as has been systematically exhibited, by an eminent continental jurist § of the last century. To one imbued with this spirit, and realising this fact, Law has an authority, a vitality, and a splendour, not perceived by him who regards it as a series of merely positive and arbitrary enactments, expended upon the limited and transient scene of action afforded by this life only.

[The author of THE COMMENTARIES, to the leading

* Acts xv. 23—29. † Luke vi. 31. ‡ Matt. xxii 35—40. § Domat.

portions of which the reader, a century after they were written, is about to be introduced, has, in the last section of them, an observation which may well stand at the threshold of this compilation.

['Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the Civil State; which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that He superintends and will finally compensate every action in human life, all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts of our Saviour, Christ,—these form the grand foundation of all Judicial Oaths, which call God to witness the truth of facts, known perhaps to Him only, and the party attesting. All moral evidence, therefore,—all confidence in human verity, must be weakened by apostacy, and overthrown by total infidelity. Wherefore, all affronts to Christianity, or endeavours to depreciate its efficacy in those who have once professed it, are highly deserving of censure.' [To which may be added the impressive question of Cicero,* *Utiles esse opiniones has quis neget, cum intelligat quàm multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocârit; quamque sanctâ sit societas civium inter ipsos, Diis immortalibus interpositis, tum judicibus, tum testibus?* If such were the language of the wise and eloquent heathen, what should be the sentiments of those calling themselves by the name of HIM who *hath brought life and immortality to light through the gospel*, the devout and highly-favoured subjects, to use again the sublime language of the Apostle,† *of the King eternal, immortal, invisible, the only wise God, unto whom be honour and glory for ever and ever!*].

* De LL. II, 7. † 2 Tim. i, 10; 1 Tim. 1, 17.

CHAPTER II.

IMPORTANCE OF A GENERAL ACQUAINTANCE WITH THE LAWS OF ENGLAND.

[1 Blackstone's Commentaries, pp. 4—37.]*

THE science of the laws and constitution of our own country, is a species of knowledge in which the gentlemen of England have been more remarkably deficient, than those of all Europe besides. In most of the nations on the continent, where the Civil or Imperial law, under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, upon both the Institutes of Justinian, and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science which is to be the guardian of his natural rights, and the rule of his civil conduct.

I think it an undeniable position, that a competent knowledge of the laws of that society in which we live,

* Future references will be made in the abbreviated form "Bla. Com."

is the proper accomplishment of every gentleman and scholar; a highly useful, I had said almost essential, part of a liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the Twelve Tables by heart, as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

But as the long and universal neglect of this study with us in England, seems in some degree to call in question the truth of this evident position, let us proceed to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life.

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect for a moment on the singular frame and polity of that land, which is governed by this system of laws,—a land in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever [just and equal*] laws permit; which is to be effected only by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As, therefore, every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society, without knowing the obligations under which it

* Blackstone's definition is—"liberty consists in the power of doing whatever the laws permit:" but the words in brackets are added to meet the just stricture of Mr. Justice Coleridge and others,—that consistently with this definition, a *slave* is free; for he may do whatever the laws permit. But in a free country, the laws should be just and equal, and the subject should have taken part in enacting them.

lays him. [Whatever force such a remark might have a century ago, has been since greatly increased. Education has been widely diffused, and among the humbler classes of society; who have also been invested with the important trust of the electoral franchise, giving them a voice in making and altering the laws of their country: whence it is of great importance, alike to them and to the State, that they should gain such insight as they can, into at least the elements of those laws, or a few of their leading features. In addition to this, the establishment of courts of local jurisdiction, in civil cases, down to even the smallest amounts, and in the most inconsiderable transactions, suggests to those concerned, the prudence of learning somewhat of the rules of law applicable to the ordinary affairs of life, and business.] But those, on whom Providence has bestowed more abilities and greater leisure, cannot be excused for ignorance of the Laws. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom, even to suppose ignorant in this branch of learning, is treated by Mr. Locke as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a

gentleman's inferior agents, and preserve him at least from gross and notorious imposition.*

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence to such as, by choice or necessity, compile their own testaments without any technical assistance. Those who have attended courts of justice are the best witnesses of the confusion and distress that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires. [Except in desperate emergencies, no intelligent layman, however little he may have to leave, would think of making a will without legal assistance.]

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the *law* and the *fact*, as it often happens, are intimately blended together. And the general incapacity even of our best juries to do this with any tolerable propriety, has greatly debased their authority: and has unavoidably thrown more power into the

* The greatest lawyer living, Lord St. Leonards, (late Lord Chancellor of England), published a very useful little work, entitled "Letters to a Man of Property, on the Sale of Estates." 5th Edition, 1829.

hands of the judges, to direct, controul and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only, that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow subjects: it is principally with this order of men that the commission of the peace is filled. And here an ample field is open for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences, and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also (under which must be included the knowledge), of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct. [He may also subject himself to harassing legal proceedings, both civil and criminal, instituted by those whom he has injured by the undue exercise of his authority; but both the legislature and courts of law, as will be shown in a subsequent chapter, extend to a magistrate erring *bonâ fide*, without plain wilfulness, or corruption, every possible protection that is consistent with justice.]

Yet further; most gentlemen of considerable property, at some period or other of their lives, are ambitious of representing their country in parliament; and those who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far

more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, or at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments! [Every day shows more distinctly, how greatly the existence and welfare of the British State, depend upon the wisdom, moderation, and patriotism of the House of Commons. The foregoing passage should be written on the heart of every member of it.]

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility*, of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern: being not only by birth hereditary counsellors of the crown, and judges, upon their honour, of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this, their judicial capacity, they are bound to decide the nicest and most critical points of the law; to examine and correct such errors as have escaped the most experienced sages of the profession, the lord chancellor and the judges of the courts of law and equity. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be

* One of the Constitutions of King Alfred expressly required that his nobility should be instructed in the laws. See Mr. Macqueen's admirable "Practice of the House of Lords and Privy Council," p. 2, note *b*.

had; and to their determination, whatever it be, all the inferior courts of justice must conform, otherwise the rule of property would no longer be uniform and steady. [Though this be theoretically true, it is not so in practice. The judicial duties of the Lords are almost invariably devolved upon judicial Peers—those who fill, or have filled, the highest judicial offices in the kingdom. In strictness, a lay-peer may certainly vote in the adjudication of a question of law; but such an exercise of his right is prudently waived, in modern times.]

The Roman pandects will furnish us with a piece of history not inapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, then the oracle of the Roman law; but for want of some knowledge in that science, could not so much as understand even the technical terms which his friend was obliged to make use of. Upon which Mutius Scævola could not forbear to upbraid him with this memorable reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to such a proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scævola himself!

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator: but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those who are

entrusted by their country to maintain, to administer, and to amend them.

Nor will some degree of legal knowledge be found in the least superfluous to members of the learned professions. The clergy, in particular, besides the common obligations they are under, in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony and simoniacal contracts; to uniformity, residence, and pluralities: to tithes and other ecclesiastical dues; to marriages; [to Commissions under the Church Discipline Act]; and to a variety of other subjects consigned to the care of their order, by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers. [It is needless to say that all the matters mentioned in this paragraph have been, as will be shown in due time, the subject of sweeping changes since the days of Blackstone; without, however, impairing the force of what is there stated.]

For the gentlemen of the faculty of physic, I must frankly own that I see no special reason why they, in particular, should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge—a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, that it might frequently be of use to families, upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution. [Since Blackstone's time many legal changes have rendered it incumbent

on medical gentlemen to acquire a knowledge of the laws. They are often called as witnesses on important occasions, and fill responsible legal offices; while Forensic Medicine, as it is called, has grown into something like a science.]

But those gentlemen who pretend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men, next to common lawyers, the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom: they are no more binding in England, than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no further; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions: for even in Holland, where the imperial law is much cultivated, and its decisions are pretty generally followed, we are informed by Van Leeuwen, that it "receives its force from custom and the consent of the people, either tacitly or expressly given: for otherwise (he adds) we should no more be bound by this law than by that of the Almains, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English courts, wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law, in either instance, both may, and frequently does, prohibit and

annul their proceedings: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota, or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected: and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the Maritime, and Ecclesiastical law. The propriety of this inquiry the University of Oxford has for more than a century so thoroughly seen, that in her statutes she appoints that one of the three questions to be annually discussed at the act, by the jurist-inceptors, shall relate to the common law, subjoining this reason, "*quia juris civilis studiosos decet haud imperitos esse juris municipalis, et differentias exteri patriique juris notas habere.*" And the statutes of the University of Cambridge speak expressly to the same effect. [In both these great Universities are now taught the elements of the laws of England, in a more efficient and energetic manner than heretofore; and the Inns of Court, in London, are assuming more definitely the character of a central juridical university, by establishing professorships and readerships in the various departments of law, and offering substantial inducements to students to acquire that proficiency in legal knowledge, which alone can justify them in looking for professional success, and entitle them to the confidence of the country in those numerous judicial, and *quasi*-judicial situations, both at home and abroad, which are now open to those of only a moderate length of standing at the bar.] *

* *Three* years' standing is sufficient for the appointment of Revising Barrister!

It must be confessed that the study of the laws is not matter of amusement merely; for the learner will be considerably disappointed, if he look for entertainment without the expense of attention: an attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation, or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtle distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue, [writing in the time of Henry VI.,] when first his Royal Pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he trace up the principles and grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he may be sufficiently informed in the laws of his country, if he will but apply his mind, in good earnest, to receive and apprehend them. For, though such knowledge as is necessary for a judge, is hardly to be acquired by the lucubrations of twenty years, yet with a genius of tolerable perspicuity, that knowledge which is fit for a person of birth or condition, may be learned in a single year, without neglecting his other improvements."

[To this it may be added, that an example of carefully studying the laws which govern this mighty empire, has been recently set to its subjects of every degree, in an illustrious quarter.]

CHAPTER III.

LAW IN GENERAL, AND ITS DIFFERENT KINDS.

[1 Bla. Com., 38—43.]

[It is of importance that a right notion should be early fixed in the mind, of what constitutes Law, in its strict and proper sense. It is A COMMAND, addressed by a rational superior to a rational inferior, to do, or not to do, certain acts: and this command signifies the power and purpose of the person commanding, to inflict an evil or pain, if his will be disregarded. Being liable to such evil or pain, the person commanded is *obliged* by the command, or under a *duty* to obey it; wherefore command and duty are correlative terms. Hence it will be seen, that when the word "law" is applied to inanimate matter, or irrational creatures,* it is used only figuratively, metaphorically, and by way of analogy, more or less faint and remote. Where there is not sufficient intelligence to conceive the purpose of a law, there is not the will on which law can operate, or which duty can incite or restrain; and there can be no obedience, in the sense with which we are concerned.

[When people speak of the *laws* of matter,—as that the movements of lifeless bodies are determined by certain "laws,"—it is meant, only that such bodies move in certain

* As it is by Blackstone, in divers paragraphs; for which and other reasons, those in the text are substituted.—See Austin's *Province of Jurisprudence, passim.*

uniform modes, through the pleasure and appointment of God: but, being lifeless, they are insensible to the *sanction* of a law, and incapable of obligation. With reference to animals, again, they cannot understand a law, or guide their conduct by a duty; and their uniformity of action is an effect of the Divine pleasure, closely resembling the uniformity of conduct secured by the authors of law, in those obnoxious to its *sanction.**

[Laws, in their true sense, and most general division, are divine, and human; that is, laws set by God to his human creatures, and laws set by those human creatures to one another: but the Divine Author of our faith has distinctly declared to us, the awful difference between the sanctions by which divine and human laws, are respectively enforced: *I say unto you, my friends, be not afraid of them that kill the body, and after that have no more that they can do. But I will forewarn you whom ye shall fear. Fear Him which after He hath killed, hath power to cast into hell. Yea, I say unto you, Fear Him.*†

[Again: Laws are said to proceed from a *superior*, and to bind an *inferior*:—the superior being he who has the power of inflicting evil or pain on another, and obliging him, by fear of it, to obey; and the latter, as being liable to such infliction, is therefore the inferior. ‡

[Bearing in mind these fundamental principles, let us proceed to consider the laws with which we are concerned, and which consist] of the rules of human action, or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties, in the general regulation of his behaviour, [in conformity with the will of his Maker.]

* By "sanction" is meant that penalty by which the law is "*sancita*" —guarded or fenced about, and thereby obedience enforced.

† Luke xii., 4, 5.

‡ See Austin's *Province of Jurisprudence, Lect.* i. *passim.*

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being; and, as he depends absolutely upon his Maker for every thing, it is necessary that he should, in all points conform to his Maker's will.

This will of his Maker [has usually been] called—the Law of Nature [but may be better designated as the Divine, in contradistinction to human, law.] For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator as a being of infinite power only, he was able unquestionably to have prescribed whatever laws he pleased to his creature man, however severe. But as he is also a being of infinite wisdom, he has laid down eternal, immutable laws of good and evil, which he had enabled human reason to discover, so far as necessary for the conduct of human actions. Such among others are these principles; that we should [ourselves live virtuously, injure no man, and render to every one his due;] to which three general precepts, Ulpian reduced the whole doctrine of law. *Juris precepta sunt hæc, honestè vivere, alterum non lædere, suum cuique tribuere.**

* Savigny, in commenting on this celebrated passage, [the translation of which, in the text, has been substituted for the inadequate one given by Blackstone] says, that the first of the three principles '*honestè vivere,*' i.e., the maintenance of the moral rectitude of the individual, contains the germ of the other two : the former of them, '*alterum non lædere,*' having an exterior character, still more visible in the third, '*suum cuique tribuere,*' both of which may be observed, without reference to the morality of the agent. From that, however, spring the observance of all rights due to others, and obedience to the grand apostolic precept, *honour all men.*

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to quicken their inquiries; and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As therefore the Creator is a being, not only of infinite power and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity—has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstract rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, that man should pursue his own true and substantial happiness. This is the foundation of what we call *ethics*, or *natural law*. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it. [The consequences of human actions, observes our great moralist,* being sometimes uncertain, and sometimes remote, it is not possible in many cases for most men, nor in all cases for any man, to determine what actions will ultimately produce happiness; and therefore it was proper that revelation should lay down a rule to be followed in

* Dr. Johnson, review of Soame Jenyns' *Enquiry into the Origin of Evil.*

opposition to appearances, and in every change of circumstances; by which we may be certain to promote the general felicity, and be set free from the dangerous temptation of doing evil, that good may come.]

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original. [The proposition that no human laws are of "*any validity*" if opposed to the laws of nature, requires great caution in its practical application; for it may be very gravely asked, what would become of society, if every man's observance of the law, were to depend upon his own notion of its conformity to the law of God, or inconsistency with it? Who should draw the line, and where should it be drawn? Society would soon be reduced to anarchy.—The passage referred to appears to confound law, as it ought to be, with law as it is: legislation, with jurisprudence. A bad law, is yet *the law*, and must be obeyed as such, but proper efforts should be made to alter it. In an extreme case, recourse must be had, as Blackstone elsewhere remarks, to those inherent though latent rights of society, which no climate, time, constitution, or contract, can ever destroy or diminish; but as a general rule, every man is bound to obey the existing law of the land, as a moral duty; and, moreover, a law should be *presumed* to be just, and in conformity with the divine law. The proof that it is not, and the consequence of error, lie on him who chooses to disobey.]

But in order to apply this law of nature to the particular exigences of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs, in every circumstance of life, by considering what method will tend the most effectu-

ally to our own substantial [and ultimate] happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide than this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct *Revelation*. The doctrines thus delivered, we call the revealed law, and they are to be found only in the Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature,* as they tend in all their consequences to man's felicity. But we are not thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state, since we find that, until they were revealed, they were hid from the wisdom of ages. As, then, the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be, by God himself; the other is only what, by the assistance of human reason, *we imagine* to be that law. If we could be as certain of the latter as

* Bishop Butler shows, with incomparable force and distinctness, Christianity to be a republication, and external institution, of natural religion, and as containing an account of a dispensation of things not discoverable by reason: that natural religion is the foundation and principal part of Christianity, but not in any sense the whole of it. See *The Analogy of Religion*, Part II., chap. i., on the Importance of Christianity.

we are of the former, both would have an equal authority; but till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the revealed law, and the natural, leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits., and herein it is that certain laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to the former. To instance in the case of murder; this is expressly forbidden by the revealed, and demonstrably by the natural law: and from these prohibitions arises the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation, *in foro conscientiæ*, to abstain from its perpetration. Nay, if any human law should allow, or enjoin us, to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters in themselves indifferent, and not commanded or forbidden by those superior laws; the inferior legislature has scope and opportunity to interpose, and to make that action unlawful, which before was not so.

But Man being formed for society, is neither capable of living alone, nor indeed has the courage to do it. As [, however, since the dispersion of mankind when assembled on the plain of Shinar, they are no longer] united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law, to regulate this mutual intercourse, called the Law of Nations; which, as none of

these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities; in the construction, also, of which compacts, we have no other rule to resort to, but the law of nature, being the only one to which all the communities are equally subject; and therefore the civil law justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

[The dignity and importance of this great branch of jurisprudence, in the existing state of the world, cannot fail to recommend it to the deep attention of not only the professional law student, but of every nobleman or gentleman animated by liberal views, and a generous ambition to assume stations of high public trust: where an ignorance of at least the leading doctrines of the law of nations, would expose him to great contempt.

The law of nations is the offspring of modern times; for the most refined states among the ancients, seem to have had no idea of the moral obligations of justice and humanity, between nations; and there was no such thing in existence as international law. They considered strangers, and enemies, as nearly synonymous terms. We, however, regard states as Moral Persons, having a public will, capable of right and wrong, and free to do either; being merely collections of individuals, each of whom carries with him, into the service of the community, the same binding law of morality and religion, which ought to control his conduct in private life. So far as founded on the principles of natural law, the law of nations, as we have seen, is equally binding in every age, and upon all mankind. But the Christian nations of Europe and America, by their superiority in the arts of civilisation, as well as in policy and government, and above all, by the brighter light, the more certain truths, and the more definite sanction which Christianity has communicated to the ethical jurisprudence of the ancients, have esta-

blished a law of nations peculiar to themselves. They form, together, a community of nations united by religion, manners, morals, humanity, and science; as well as by the mutual advantages of commercial intercourse, and by the habit of forming alliances and treaties, of interchanging ambassadors, and recognising and studying the same writers, and systems, of public law.*]

* See Kent's Commentaries, Part I., sect. 1. *passim.*

CHAPTER IV.

MUNICIPAL LAW.

[1 Bla. Com., 44—51.]

MUNICIPAL LAW, is the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian:—*jus civile, est quod quisque sibi populus constituit.* It is called municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium*, or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." [The propriety of this definition, especially of the latter members of it, has been frequently questioned, and with reason. It suffices, however, in a general way; especially as subsequently expounded, to indicate the substance of what it professes to define. Perhaps municipal law may be better defined as, a 'rule prescribed by the sovereign power of a state to its subjects, declaring some right, enforcing some duty, or prohibiting some act.'] Let us endeavour to explain the several properties of municipal law, as they arise out of this definition.

And, first, it is a *rule*: not a transient sudden order from

a superior, to, or concerning, a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a "municipal law;" for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence [on an individual], than a law [for a community]. But an act to declare that the crime of which Titius is accused, shall be deemed high treason, has permanency, uniformity, and universality, and therefore is properly a rule. It is called a rule also, to distinguish it from advice, or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law, depends not upon *our approbation*, but upon the *maker's will*. Counsel, is matter of persuasion only, law, of injunction; counsel acts upon the willing only, law upon the unwilling also.

It is also called a rule, to distinguish it from a compact or agreement; for a compact is a promise proceeding *from* us, while law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal, in respect of conscience, to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it: in laws, we are obliged to act, without ourselves determining or promising any thing at all. Upon these accounts law is defined to be *a rule*.

Municipal law is also a rule *of civil conduct*. This distinguishes municipal law from the natural, and revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered

in the light of an individual. But municipal or civil law [, which should be founded on these,] regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties which he has engaged in, by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise a rule *prescribed*: because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it; but there are various modes of doing so. It may be notified by universal tradition and long practice, which suppose a previous publication, and is the case of the common law of England. It may be notified *vivâ voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are still appointed to be publicly read in churches and other assemblies. It may, lastly, be notified by writing, or printing; which is now done with all our acts of parliament [proclamations, and public instruments]. Yet, whatever method be adopted, it is incumbent on the promulgators to do it in the most public and conspicuous manner; not like Caligula, who, according to Dio Cassius, wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people.—There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when, after an action, indifferent ini tself, is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it was impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining, must consequently be cruel and unjust.

[The true principle of jurisprudence is, that as the tree falls, it should lie: that is, an act done, should be dealt with strictly according to the then existing law: in respect of not only the kind, but the manner, and degree, of punishment. *Æstimatio præteriti delicti, ex post facto, nunquam crescit*, is a maxim of the civil law adopted by Lord Bacon. Acts of attainder, in capital, and bills of pains and penalties in lesser cases, are violations of this cardinal principle of legislation, which is equally applicable to civil matters: as indicated, in a statute, by the words "from and after the passing of this Act."] All laws should be therefore made to commence *in futuro*, and be notified before their commencement: which is implied in the term *prescribed*. But when this rule has been in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But further: municipal law is a rule of civil conduct prescribed *by the supreme power in a state*. For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other. This, however, renders expedient a brief enquiry, which will form the subject of the ensuing chapter, into the nature of society, and civil government: the natural right, inherent in the sovereignty of a state, wherever that sovereignty may be lodged, of making and enforcing laws, in the words of our definition, to "prescribe the rule of civil action." And this may be discovered from the very end and institution of civil states. For a *State* is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If, therefore, it is to act

as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced, than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will, of that one man, or assemblage of men, is, in different states, according to their different constitutions, understood to be, law.

Thus far as to the right of the supreme power to make laws; but farther, it is its duty, likewise. For since the respective members are bound to conform themselves to the will of the State, it is expedient that they receive directions from the state, declaratory of its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons, in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute, and what relative, duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the State assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition is, I trust, sufficiently evident; that "*municipal law is a law of civil conduct, prescribed by the supreme power in a state.*" I proceed now to the latter

branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one, and prohibit the other.

For this purpose, every law may be said to consist of several parts: one, *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law: whereby it is signified what evil, or penalty, shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the divine law, natural or revealed, as upon the wisdom and will of the human legislator. This doctrine deserves a more particular explication. Those rights, then, which God has established, and are therefore called natural rights, such as life and liberty, need not the aid of human laws to be more effectually invested in every man, than they are; neither do they receive any additional strength, when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall

himself commit some act that amounts to a forfeiture. Neither do divine or natural duties, such as, for instance, the worship of God, the maintenance of children, and the like, receive any stronger sanction from being also declared by the law of the land to be duties. The case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature: for that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law, has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things *in themselves indifferent*, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our common law has declared, that the goods of the wife do instantly, upon marriage, become the property and right of the husband; and our statute law has declared all monopolies a public offence; yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, the subjects of *mala prohibita*, it must be left to our own legis-

lature to decide, in what cases the seizing another's cattle shall amount to a trespass, or to a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the declaratory part of the municipal law; and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law which says, "Thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong, depends upon the direction of the laws to do, or to omit them.

The *remedial* part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld, or invaded. This is what we properly mean, when we speak of the protection of the laws. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested, by his death, in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office: will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or, the evil that may attend the breach of public duties; it is to be observed, that human legislators have, for the most part, chosen to make the sanction of their laws rather *vindicatory*, than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of

obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because, also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil, is a much more forcible principle of human actions, than the prospect of good. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those entrusted with the care of putting the laws in execution.

Of all the parts of a law the most effectual is the vindicatory. For it is but lost labour to say, "do this, or avoid that," unless we also declare "this shall be the consequence of your non-compliance." We must, therefore, observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

[The vital essence of a law being its *sanction*, that is, the enforcement of obedience, the Romans treated as *imperfect*, and not obligatory, those which were without such sanction: which declared certain acts or omissions to be crimes, but omitted to annex a punishment to the committal of them. Such might express a *wish* or *desire*, but no purpose to enforce observance. They might be counsel or exhortation, from a superior to an inferior, but no *command*. In English law, however, a prohibition *implies* a penalty, and a penalty a prohibition. Where our legislature professes or affects to command, our tribunals presume that it exacts obedience; and if no express sanction be annexed to a statute, *they* supply one; punishing with fine and imprisonment, as for a

contempt and misdemeanour, one who disobeys a statute, itself annexing no punishment to disobedience.

When moral writers speak of '*duties of imperfect obligation*,' all that is meant is, that they are not *legal* duties, inasmuch as they lack the specific sanction imparted by the State, and rest on solely *moral* sanctions. The phrase, however, is not a happy one, and has misled many.]

CHAPTER V.

DIFFERENT FORMS OF CIVIL GOVERNMENT.

[1 Bla. Com. 44—51.]

THOUGH society had not its formal beginning from any convention of individuals, actuated by their wants and their fears, yet it is the sense of their weakness and imperfection that *keeps* mankind together, demonstrates the necessity of this union and is therefore the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the "*original contract* of society;"* which, though perhaps in no instance, it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that, in return for this protection, each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would

* As to this "original contract" or "social compact" of society, its modern signification, and the controversies to which the expression has given rise, *vide post.*

be without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society are naturally equal, it may be asked, to whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases, has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, goodness, and of power; wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of SOVEREIGNTY, and these are the requisites which *ought* to be found in every well constituted frame of government.

How the several forms of government which we now see in the world, at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. [The great question undoubtedly is, not, How did governments originate? but, What is the principle lying at the basis of them all, and becoming more distinctly developed with the progress of political society? The principle which supports the organisation of a tree, it has been well said by a German jurist, remains the same, whether it be raised from a seed, or a cutting; and the inquirer would learn little of its nature, from determining to which of these its origin is to be referred. The second of the above questions, may perhaps be safely answered by saying, that the principle lying at the basis of all political union, is the *Just;* as the *Good,* is the foundation of morals, and the *Beautiful,* of the Fine Arts. And this idea of Justice, is, in politics, only a modification of *Equality,*

the animating principle of all political societies, whatever may have been their origin; and is invariably developed in the progress of society, as the flower is the produce of the perfect plant: the idea of force declining, as the other is developed.]

However the several forms of government began, or by what right soever they subsist, there is, and must be, in all of them, a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein, according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation, the qualities requisite for supremacy,—wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a DEMOCRACY; the second, when it is lodged in a council, composed of select members, and then it is styled an ARISTOCRACY; the last, when it is entrusted in the hands of a single person, and then it takes the name of a MONARCHY. All other species of government, they say, are either corruptions of, or reducible to, these three. [And the ancients were right, as is shown by the experience of all succeeding times. Government by the Many, the Few, or the One, exhausts the subject; for it is not possible to conceive any hands, or combination of hands, in which the power of protecting society can be lodged, which will not fall under one of these descriptions.]

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administra-

tion by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates; and all the other powers of the state must obey the legislative power, in the discharge of their several functions, or else the constitution is at an end.

If the object of society,* in settling the form of its existence, be the protection of every individual by the power of the united whole, the DEMOCRATICAL form of government becomes practically untenable; for the community, in a body, cannot be present to afford protection to each of its members, but must employ individuals for that purpose; choose them; lay down rules for their conduct; and punish for non-observance. In these functions are included the three great operations of government—Administration, Legislation, Judicature. To perform these functions, the whole community must be assembled; and to do this as often as the business of government requires performance, would fatally interfere with the existence of labour, thence of property; and therefore of the community itself. Besides this, a whole community would form a numerous assembly, which is notoriously incapable of calm and effective deliberation. Every day's experience in the ordinary affairs of life, shows us great bodies of men delegating to a few, the business of the whole, as by Boards, and Committees of Management; the members at large contenting themselves with a general controul.—The ARISTOCRATICAL form of government, indicates all those cases in which the powers of government are held by any number of persons intermediate between a single person, and the majority. If that number be small, it is called an Oligarchy: if considerable, an Aristocracy; which are essentially the same, in motive and object. Though a community cannot be supposed to have an interest opposite to its interest—to *intend* or

* See, for the substance of what immediately follows, the able article, *Government*, by Mr. Mill, in the "Encyclopædia Britannica."

desire evil to itself,—which would be practically contradiction in terms,—it may yet act wrongly, from error, and be incompetent, from inherent inaptitude, for the purpose of good and wise government. The danger of an Aristocracy, however wise and experienced its members, may be looked for in their being liable to have interests at variance with those of the community at large; and the source of evil is radically different, in the case of an Aristocracy, from that of a Democracy. A MONARCHICAL form of government is liable to the same objections as the Aristocratical; but it has advantages.] It is, indeed, the most *powerful* of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hands of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections, and imperfections. Democracies, [may perhaps be considered] the best calculated to direct the end of the law; aristocracies, to invent the means by which that end shall be obtained; and monarchies, to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three; for though Cicero declares himself of opinion [that "that government is the best, which is composed of the regal, patrician, and popular, moderately blended together,] * yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as more easily praised than realised—and which, if realised, can never be of long duration.

Happily for us of this island, however, the British constitution has long remained, and I trust will long continue, a

* Esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optime, et populari, sit modicè confusa. The translation in the text is that of Lord Brougham, in his *Political Philosophy*.

standing exception to the truth of this observation. For, as with us the *executive* power of the laws is lodged in a single person, they have all the advantages of strength and despatch that are to be found in the most absolute monarchy; and as the *legislature* of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons characterised by their piety, their birth, their wisdom, their valour, or their property; and thirdly, the house of commons, freely chosen by the people, from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything;—there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous. [It was not surprising that Tacitus should treat as chimerical, the notion of combining the three kinds of government; because the ancients were strangers to a REPRESENTATIVE system of government. Each of the three with which they were acquainted, was radically defective, in deriving its origin from that supreme governing power which they were designed to curb, or mitigate, and in depending, for continuance, on its will and pleasure. When the people were excluded from a share of the supreme power,—that is, before the principle of representative government had been discovered,—the difficulty of maintaining a mixed government, in which they should share, may well have been deemed practically insurmountable. By a mixed government, is to be understood, that constitution into which more than one of the three kinds of government enter, and in which the supreme power is lodged in more than one body, each being entirely independent of the other, and as well irremoveable by, as unaccountable

to any earthly authority whatever, in acts of the supreme or legislative authority.*

[In this doctrine, of the mixture of the simple forms of government, has been included the celebrated theory of the *balance* among the component parts of a government: that is, that when a government is composed of monarchy, aristocracy, and democracy, they *balance one another*, and, by mutual checks, produce good government; of which Blackstone's idea may be seen in a subsequent chapter. This, however, has been deemed a chimerical theory, and it has been asked,† if there be three powers, how is it possible to prevent two of them from swallowing up the third? It cannot be for the interest of either the monarchy or aristocracy to combine with the democracy, or community at large, whose interest it is that neither the king nor aristocracy should have any of the power, or any of the wealth of the community, for their own advantage: — while the monarchy and aristocracy have all possible motives for contriving to obtain that wealth and power; and unless the people be strong enough to be a match for the other two, they have no protection. The "balance," therefore, is regarded as a thing impossible. If, then, the community at large cannot, for reasons above explained, exercise the power of governing themselves, and must intrust it to others —to either the One or the Few, who have such motives to make a bad use of their powers; nothing remains but to devise checks which may prevent them: and these are found in the grand discovery of modern times, the system of representation, solving all difficulties, practical or speculative. Its essential conditions are twofold, the checking body must have sufficient power for checking; and have that identity of interest with the community, which will prevent a mischievous use of its power. And here may be cited the opinion of a leading statesman ‡ of the present day, who

* This definition is by Lord Brougham. † By Mr. Mill.

‡ Lord John Russell, "Hansard," Vol. CV., 3rd Series, pp. 1224, 1225.

has been more concerned than most men of his age, in examining the theory of our constitution, and regulating the practical working of our representative system':

[" My belief is, that not a balance of forces, but a combination of powers, brought about by monarchy, aristocracy, and democracy acting together, produces as much of liberty and happiness, as great a development of talent, and as great encouragement in the practice of moral and religious duties, as has been produced by any combination the world ever exhibited. In framing and proposing the Reform Bill, what we wished was, to adapt the representation of the House of Commons to the other powers of the state, and keep it in harmony with the constitution. That object, I think, after seventeen years' * trial, we have attained. Our view, in framing the measure for amending the Representation of the people, was to found it on the ancient constitution of the country, so that our amendments should agree with the various other parts of our ancient, free, and glorious constitution. The object of representation is the good government of the country; not mere conformity to abstract rights, but the welfare of the community at large: and that system of representation which contributes most to the good government of the country, is superior to any theoretical plan of perfection, which may be devised by mere speculators. The people of this country are as much attached to the constitutional monarchy, as the people of any country have ever been attached to the constitution of their own state."]

* This was spoken on the 5th of June, 1849.

CHAPTER VI.

THE COMMON LAW OF ENGLAND.

[1 Bla. Com., 63—78.]

THE municipal law of England, or '*the rule of civil conduct prescribed*' to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written, or statute law. [This distinction existed in both the Greek and Roman law. Constat, autem, jus nostrum, quo utimur, aut scripto, aut sine scripto,—ut, apud Græcos, *των νομων οἱ μεν εγγραφοι οἱ δε αγραφοι*. Sine scripto, jus venit, quod usus approbavit: nam diuturni mores, consensu utentium comprobati, legem imitantur.] *

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law, properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular LAWS that are, by custom, observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present, solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly

* Instit. I. 2, 3, 9.

overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed, had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws, as well as learning, to memory; and it is said of the primitive Saxons here, as well as of their brethren on the continent, that *leges solâ memoriâ et usu retinebant.* But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ,* because their *original institution and authority are not set down in writing, as acts of parliament are; but receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.* In like manner as Aulus Gellius defines the *jus non scriptum* to be, that which is *tacito et illiterato hominum consensu, et moribus, expressum.*

Our ancient lawyers, and particularly Fortescue, insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance, and ought to signify only, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless by the intermixture of adventitious nations,—the Romans, the Picts, the Saxons, the Danes, and the Normans,—they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby, in all probability, improving

the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, says Lord Bacon, are mixed as our language; and as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred, the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his doom-book, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of king Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanours, and the forms of judicial proceedings. [The work here styled the Doom-Book is not lost, but, as already stated,* still extant. It is little more than a collection of punishments for offences, and has no pretensions to be regarded as a general system of municipal law. This remark must be borne in mind, in reading several of the ensuing passages.]

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the West Saxons, which obtained in the counties to the

* Ante, p. 1.

south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government. [Sir Henry Spelman says, that these three classes of laws hold all an uniformity in substance, differing rather in their *mulcts*, than in their canon;—that is to say, in the quantity of fines and amercements, than in the course and frame of justice. It is also said that the word "*lage*," translated in the text "law," signifies also a province, or jurisdiction.]

Out of these three laws, Roger Hoveden and Ranulphus Cestrensis inform us, King Edward the Confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom. [On the accession of the Confessor, he was required by the clergy and nobility of the nation, to engage that the laws of Canute should be inviolably observed; and the condition of the restoration of the Confessor, was his promise, confirmed by his coronation oath, to do so. Hence the older body of laws acquired the name, of *The Laws of the Confessor*, not because he enacted them, but because they received a new and efficient sanction from his authority.] *

These are the laws which our histories so often mention under the name of The Laws of Edward the Confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by

* Sir F. Palgrave.

foreign emergencies, or domestic discontents. [The fair-haired blued-eyed King was the last Anglo-Saxon Sovereign of Cerdic and Woden's race; the name, 'the Laws of Edward the Confessor,' became therefore, the symbol, as it were, of the whole Anglo-Saxon constitution.]* These are the laws which so vigorously withstood the repeated attacks of that civil law which established, in the twelfth century, a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, now known by the name of THE COMMON LAW: a name given to it, either in contradistinction to other laws, as the statute law, the civil law, the canon law, and the like; or more probably, as a law common to all the realm; the *jus commune*, or *folcright*, mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned.

The unwritten, or common law, of England is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction. Of all these, in their order.

I. As to GENERAL CUSTOMS, or THE COMMON LAW, properly so called. This is that law, by which proceedings and determinations in the queen's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the

* Lappenberg.

manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery,* the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;— all these are doctrines that are not set down in any written statute, or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

But here a natural and material question arises: how are these customs and maxims to be known, and by whom is their validity to be determined? The answer is, *by the judges, in the several courts of justice.* They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath, to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the *viginti annorum lucubrationes*, which Fortescue mentions: and from being long personally accus-

* Since this was written, and within the last quarter of a century, the number of the Courts of Chancery has been considerably increased by the legislature. There are now six: that of the Lord Chancellor, of the Two Lords-Justices, of the Master of the Rolls, and those of the three Vice-Chancellors. The three superior common-law courts remain as they were, in point of number: but an additional judge has been appointed to each, making the whole number fifteen.

tomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous to it, are carefully registered and preserved, under the name of "records," in public repositories * set apart for that particular purpose; and to them recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the *præteritorum memoria eventorum* reckoned up as one of the chief qualifications of those who were held to be *legibus patriæ optime instituti.* For it is an established rule, to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law, in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law,

* The public Records of the kingdom are, by a recent statute (1 & 2 Vict. c. 94), placed under the superintendence of the Master of the Rolls, in a newly established Record Office.

but that it was *not* 'law,' that is, that it is not the established custom of the realm, as had been erroneously determined. [Sometimes a long series of decisions has been reversed by a later decision of a court of law, especially of error; and often an act of parliament is resorted to for that purpose.] Hence it is, that our lawyers are with justice so copious in their encomiums on the reason of the common law; telling us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can, at this distance of time, be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law, then, is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration.

The law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule, that the decisions of courts of justice are the evidence of what is common law; in the same manner as, in the civil law, what the emperor had once determined, was to serve as a guide for the future.

The decisions, therefore, of courts, are held in the highest regard; and are not only preserved as authentic records, but handed out to public view in the numerous volumes of

Reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the Second, inclusive; and from his time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the Year Books. And it is much to be wished that this beneficial custom had, under proper regulation, been continued to this day: for, though king James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected; and from the reign of Henry the Eighth to the present time, this task has been voluntarily executed by many private and contemporary hands, [often of competent learning and ability, but occasionally, also, by those] who, either through haste and inaccuracy, or mistake and want of skill, have published very crude and imperfect. perhaps contradictory, accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works.* However,

* The following passage from Sir Edward Coke, affords an instance of the occasional drollery and quaintness of his style when treating even the gravest subjects. "And albeit I concurred with those that adjudged the plaintiff to be no alien, yet do I find a mere stranger in this case—such an one as the *eye* of the law (our books and book-cases) never saw, as the *ears* of the law (our reporters) never heard of, nor the *mouth* of the law (for judex est lex loquens) the judges, our fore-fathers, never tasted, as the

his writings are so highly esteemed, that they are generally cited without the author's name, [thus—"10th Reports 18a."]

Besides these reporters, there are also other authors, to whom great veneration is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staunforde, with some others of ancient date; whose treatises are cited as authority, and are evidences that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles. [That of Bracton, who was a justice in the latter part of the reign of Henry III., derived some authority from the high station which he held; and his work incorporates large portions of the civil law, and contains the foundation of a great part of our system; and we are still elaborating principles contained in it. This treatise may be regarded as evidence of what the common law was in his time, and of its extensive obligations to the Roman law. Lord Holt's famous judgment in the case of Coggs *v.* Bernard* cites five passages from Bracton: who has taken every one of them from the Institutes.] One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of Institutes, as he has been pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton, in the reign of Edward the Fourth. This comment is a rich mine of valuable common law

stomach of the law (our exquisite and perfect records of pleadings, entries, and judgments) never digested."—*Calvin's* case, 7 Co. 4.

* 2 Lord Raym. 917. See Mr. Long's "Two Discourses," p. 108.

learning, collected and heaped together from the ancient reports and year books, but greatly defective in method. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts. [Sir Edward Coke is to be regarded,—says Mr. Butler, one of the most learned lawyers of modern times,—as the centre of modern and ancient law, between which his writings stand, connecting them; and by showing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another].

And thus much for the first ground and chief corner stone of the laws of England, that is, general immemorial custom or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

II. The second branch of the unwritten laws of England, are PARTICULAR customs, or laws, which affect the inhabitants of particular districts only.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs, [prevailing in various parts of the country, when it was broken into distinct districts or kingdoms, and out of which, after these became a single kingdom, one common law was collected applicable to the whole]; each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; which privilege is confirmed to them by several acts of parlia-

ment. [The validity of a particular custom depends on the following rules: that it must have been used so long that, in legal phrase, the memory of man (which in this case goes as far back as the 3rd September, 1189, when Richard I. ascended the throne)* runneth not to the contrary; it must have been *continued*, *i.e.*, without any interruption of the right, as contradistinguished to the possession; it must have been *peaceable*, or acquiesced in; it must not be *unreasonable* in its nature; it must be *certain*; it must be *compulsory* in its observance; customs must be *consistent* with each other; if a particular one be in derogation of the law, it must be construed strictly; and finally no custom avails against an express act of parliament.]

* This rule, however, has been seriously qualified by a late statute, relating to customary and prescriptive rights exercised over the lands of others.—Stat. 2 & 3 Wm. 4, c. 71.

CHAPTER VII.

THE CIVIL AND CANON LAWS.

[1 Bla. Com. 79—84.]

THE third branch of the unwritten laws of England, are those peculiar laws which by custom are adopted and used in only certain peculiar courts and jurisdictions,—and by these I understand the CIVIL and CANON laws.

It may seem a little improper, at first view, to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned, in both branches of the law. But I do this, after the example of sir Matthew Hale; because it is most plain, that it is not on account of their being written laws, that either the canon or the civil law has any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognise any foreign power as superior or

equal to it in this kingdom; or as having the right to give law to any, the humblest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom, in some particular cases, and some particular courts, and then form a branch of the *leges non scriptæ*, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in the following remarkable words of Stat. 25 Henry VIII., addressed to that king.

"This your Grace's realm, recognising no superior under God but only your Grace, hath been, and is, free from subjection to any man's laws but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your Grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them: and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

I. By the CIVIL LAW, absolutely taken, is generally understood *the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digest of the emperor Justinian, and the Novel Constitutions of himself and some of his successors.* Of these, as affording illustrations of our own laws, it may not be amiss to give a short and general account.

The Roman law,—founded first upon the regal constitutions of their ancient kings; next upon the twelve tables of the *decemviri*; then upon the laws or statutes enacted by the

senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers; and lastly upon the imperial decrees, or constitutions of successive emperors,—had grown to so great a bulk, as Livy expresses it, *tam immensus aliarum super alias acervatarum legum cumulus*, that they were computed to be many camels' load, by an author who preceded Justinian. This was in part remedied by the collections of three private lawyers; Gregorianus, in the year 306, Hermogenianus, in the year 365, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A.D. 438, being a methodical collection of all the Imperial Constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe generally, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded in only the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 529.

This consists of, 1. The INSTITUTES, which contain the elements or first principles of the Roman law, in four books. [These have recently been invested with great additional interest, by the remarkable discovery of Niebuhr, in the year 1816, in the Cathedral Library at Verona, of a palimpsest, containing the long-lost Institutions of *Gaius*, one of the five great Roman jurists,* from which were compiled those of Justinian, and on which, in the language of Professor Hugo, they "throw new and bright light."] 2. The DIGESTS, or PANDECTS, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A NEW CODE, or collection of imperial constitutions, in twelve books; the lapse of a whole century

* Gaius, Papirius, Paulus, Ulpian, and Modestinus.

having rendered the former code of Theodosius imperfect. 4. The NOVELS, or NEW CONSTITUTIONS, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian.

[It is stated by Blackstone, as if it were an undisputed fact, that the civil law had fallen into neglect and oblivion, till suddenly resuscitated by the accidental discovery of a copy of the pandects, at Amalfi, in the year 1130; which occurrence he also represents as having stimulated Gratian to reduce the canon law into a system. This must, however, be regarded as an exploded error; for though it had long been suspected by the learned to be such, the profound researches of Savigny have conclusively established the fact, that no such effect is due to any such cause: that whether a copy of the pandects were or were not, in point of fact, discovered at the time and place alleged, the study of the civil law in Europe had really never entirely ceased, but was vigorously and extensively prosecuted in various quarters of Europe, before the period in question. This celebrated manuscript, we are informed by Gibbon, was bound in purple, deposited in a rich casket, and shown to curious travellers, by the monks and magistrates, bare-headed, and with lighted tapers. It now reposes in the Lorenzo-Medicean library at Florence, where it is vigilantly guarded.

[Though Blackstone has incidentally alluded to the subject, he by no means affords his reader any idea of the extent to which our law is really under obligation to that of the Romans. Sir Mathew Hale had plainly declared "that the principles of our law are borrowed from the civil law, and therefore in many things grounded on the same reason:" yet, as Sir William Jones long afterwards remarked, "few English lawyers dare make such an acknowledgment." This may be traced to well-founded jealousy of the civil

and canon laws, on the part of our ancestors; but profound modern jurists, particularly Savigny, have unquestionably established the identity of large portions of English and Roman law. In a recent case * (1848) of much interest and importance, the right to water *flowing in a subterranean course*, was solemnly decided, after long argument, in a Court of Error, entirely on principles derived from the civil law. The late learned Chief Justice Tindal, in delivering the judgment of the court, made an observation worthy of the attention of the student, and in conformity with the doctrine of Blackstone. "The civil law forms no rule binding, in itself, on the subjects of these realms; but in deciding a case upon principle, when no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." Both English and American lawyers of the present day are drawing, with increasing frequency, from this deep and pure well of ancient jurisprudence.—It is not only a matter of great national and juridical interest, to trace the progress of those long and fierce feuds between the professors of the civil and common law, of which the latter bear such visible traces; but no one can hope to obtain a scientific and systematic knowledge of the existing English law, or appear with the least credit before foreign jurists, who is ignorant of the leading principles of the civil law: a truly glorious and affecting monument of human intellect and wisdom. A considerable knowledge of that law, as now received in Europe, is requisite, moreover, for those engaged in legal practice connected with those foreign dependencies of Great Britain, in which the civil law is used. A man must know it, simply because it is the

* *Acton* v. *Blundell*, 12 Mee. & W., 324.

modified law of those countries: and the shortest and only sure way of obtaining a competent knowledge of the civil law, as it exists in any modern country, is to know what that law is, in the compilations of Justinian.* Finally,—owing to the ancient connection between Scotland and France, where the civil law prevailed, its element largely predominates in the existing law of Scotland, principally with reference to contracts and commerce; not, however, *quâ* civil law, but, in the language of Lord Stair, in conformity with that of Chief Justice Tindal, "the civil law is not recognised in Scotland as a law binding for its authority, but as a rule is followed for its equity."]

II. The CANON LAW, a body of ecclesiastical law, relative to matters over which the Romish church has, or pretends to have, a proper jurisdiction, [is derived from various sources, and consists of materials genuine and spurious. It may be almost regarded, indeed, as the spurious offspring of the civil law, from which have been drawn its most valuable ingredients; while its own peculiar maxims and rules have all one and the same tendency,—towards ecclesiastical aggrandisement. Professedly it consists of the opinions of the ancient fathers, decrees of general councils, decretal epistles, and bulls.—Early in the ninth century came into vogue, in Western Europe, a collection of false, garbled, and interpolated canons, purporting to be by St. Isidore; the object of which was to make the authority of the See of Rome absolute in all matters of ecclesiastical controversy; declaring the pope supreme head of the universal church. After various intermediate compilations, appeared, in A.D. 1151, the famous one above referred to, of GRATIAN, a Benedictine Monk, which was called the *Edictum Gratiani*, and also *Concordia Discordantium Canonum*. This work, of a formal and institutional character, but with a large proportion of spurious elements, was everywhere received

* See Mr. Long's "Two Discourses in the Middle Temple Hall," A.D. 1847, pp. 91, 92.

with enthusiasm by those who desired to extend and consolidate the power of the Roman See. Many of the errors and falsities of Gratian have been exposed by learned and candid canonists, but his work remains a great authority. "To the compilations of Isidore and Gratian," said the late eminent and learned Roman Catholic lawyer, Mr. Butler, "may be in some measure attributed one of the greatest misfortunes of the Roman Catholic church, the claims of the Popes to temporal power. That a claim so unfounded, impious, and detrimental to religion, and so hostile to the peace of the world, should ever have been made, is strange; but stranger yet is the success it met with."

[The next great collection was made in A.D. 1234,—the *Jus Decretalium*, under the auspices of the arrogant Gregory IX.; successively followed, in 1298, by the *Liber Sextus Decretalium* of Boniface VIII.; by the constitutions of Clement V., promulgated in 1317, by his successor John XXII.; and by several other collections called *Extravagantes*, probably as being *extra decretum Gratiani*.—Such are the main constituents of the *Corpus Juris Canonici*:—of that canon law, against which our ancestors struggled so long, resolutely, and successfully, as totally subversive of the liberties of mankind, by devices not to be appreciated but after a study of the system, and the history of its growth and operation in different ages and countries.

[In England, there existed, in Roman Catholic times, besides the general canon law, certain legatine and provincial constitutions, emanating from synods held respectively under the papal legates, and several archbishops of Canterbury, from the time of Henry III. to Henry VI.]

At the dawn of the Reformation, in the reign of king Henry VIII., it was enacted in parliament, that a review should be had of the canon law; and, that till such a review should have been made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and

not repugnant to the law of the land, or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England: [the limitations of which appear to be, that such canons only as existed at the time of the statute, and were adopted by our laws, bind both laity and clergy. Certain constitutions and canons ecclesiastical, 141 in number, enacted by the clergy in the year 1603, sanctioned by the charter of James I., but never confirmed by parliament, do not bind the laity, whatever regard the clergy may be bound to pay them. They form, however, the present standard of the United Church of England and Ireland.*]

There are certain courts, in which the civil and canon laws are permitted to be used, under different restrictions: the ecclesiastical courts; the courts of admiralty;† [and, at present, the court of the university of Cambridge: that of Oxford having been made subject, in the year 1854, to the common and statute law of the realm, and not the civil law, by stat. 17 & 18 Vict. c. 81, s. 45.] In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And, first, the courts of common law have the superintendency over these courts, to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and in case of contumacy, to punish the officer who executes, and, in some

* See 1 Steph. Comm., 65.

† Courts martial, naval and military, are respectively governed by a code of laws contained in the Mutiny Act and Articles of War, and in other respects by the common law of the land.—*Vide post, 'Military and Naval Estates.'*

cases, the judge who enforces the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern, either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than that which the common law puts upon them, the queen's court at Westminster will grant prohibitions, to restrain and controul them.

3. An appeal lies from [the ecclesiastical and maritime] courts to the queen in council [that is, to the Judicial Committee of the Privy Council]* in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but inferior branches of the customary or unwritten laws of England, properly called the queen's ecclesiastical, and the queen's maritime laws.

* Post, '*The Queen's Councils.*'

CHAPTER VIII.

THE WRITTEN LAW.—STATUTES, AND THE CONSTRUCTION OF THEM.

[1 Bla. Com. 85—91.]

Let us next proceed to the *leges scriptæ*, or written laws of the kingdom: which are STATUTES, ['*enacted*,' as every one of them punctiliously recites, 'by the Queen's most excellent majesty, by and with the *advice* and *consent* of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the *authority* of the same.']

The oldest of these now extant, and printed in our statute books, is the famous MAGNA CHARTA, as confirmed in parliament, 9 Henry II.: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them, perhaps, at present currently received for the maxims of the old common law. [It has indeed been said by a high authority, though too boldly, that common law is nothing but statutes worn out by time.]

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments.

[The leading distinction between STATUTES, is PUBLIC and PRIVATE, and it was first observed in the reign of Richard III. The former, signify an universal rule affecting the whole community; the latter, are rather exceptions than rules, as

operating on particular persons, localities, and private concerns. The Romans called the former *senatûs consulta*, the latter, *senatûs decreta*. Of both classes of statutes, all courts of justice must now take notice alike; both being recently, by statute 13 & 14 Vict. c. 21, s. 7, declared by the legislature public acts, unless the contrary be expressly provided.]

Another distinction is between DECLARATORY and REMEDIAL statutes. By the former, when the old custom of the kingdom is fallen almost into disuse, or become disputable, the legislature, to avoid doubts and difficulties, '*declares*' what the common law is, and ever hath been. The latter—'*remedial*'—supply some defect in the existing law, and redress some abuses or inconveniences with which it is found to be attended, without introducing any penal provision. There are, however, some other statutes not falling within either division.

[The principal rules for CONSTRUING acts of parliament, are these.

[*First.* It is a golden rule for the interpretation and construction of statutes, that the *intention* and *will* of the legislature, must be sought in the language which it has thought fit to use. That language must be taken in its plain grammatical meaning, unless such a course would lead to a clear contradiction of the apparent purpose of the Act, or to some palpable absurdity, which ought not to be lightly imputed to the legislature. There is high authority for holding that remedial statutes ought to be 'liberally,' and penal statutes, and those imposing a charge on the subject, 'strictly' construed; but such a rule should be kept ever subordinate to the cardinal one, of seeking for the *intention* of the legislature, in its *language*. A disregard of this latter, may become very dangerous; and open a wide door to tyranny, jesuitry, and judicial discretion and caprice, exactly in those cases where liberty and justice are vitally concerned in having such a door closed. This being so, it surely behoves the legislature to use great discretion and circumspection, so

to express itself with all attainable simplicity, and exactness. If any doubt arise from the terms which it has employed, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute: to consider the old law, the mischief, and the remedy:—and, if there be a preamble, it is, in the language of chief justice Dyer, a key to open the minds of the makers of the act, and the mischief which they intended to redress.*

[Light is to be collected from every part of a statute, in order to discover its general scope and intention: and no word, clause, or sentence, is to be nullified, or rejected, except from an absolute and evident necessity. It may be, that the legislature has afforded means in the act itself, for determining particular expressions to be used otherwise than in their grammatical and usual sense:—and if certain words have received a determinate signification, by legal decisions, the legislature must be assumed to have used them with such signification.

[*Secondly*. As one part of a statute is properly called in to help the construction of another part of it, and is fitly so expounded as to support and give effect, if possible, to the whole of it;—so is the comparison of one statute with another, made by the same legislature, upon the same subject, enjoined for the same reason, and attended with a like advantage.† It is to be inferred that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious. It is, therefore, an established rule, that all Acts *in pari materiâ*, are to be taken together, as if they were one Act, framed on one system, and having one object in view.

[*Thirdly*. When a statute contains a provision of a general nature, the common law must be consulted, in order to give that provision effect.

* See the judgment of chief justice Tindal in the Sussex Peerage case, in the house of lords, 11 Clark & Finelly, 143.

† Dwarris on Statutes.

[*Fourthly*. When the common law and a statute differ, the latter prevails; and an old statute yields to a subsequent one; which may repeal the former not only expressly, but by necessary implication, as, by an absolute inconsistency with it. *Leges posteriores, priores contrarias abrogant*, is a general principle of universal law; and it was a law of the Twelve Tables, that *quod populus postremum jussit, id jus ratum esto*.

[*Fifthly*. It has been lately specially enacted (stat. 13 & 14 Vict. c. 21,) that if statute A, wholly or partially repealing statute B, be itself repealed by statute C, B remains so repealed, unless C expressly declare the contrary.

[*Sixthly*. Acts of parliament derogating from the power of a subsequent parliament, are inoperative for such a purpose, on the plainest principles of legislation; for the legislature has at all times supreme and absolute authority to do as it wills.

[These may be regarded as exhibiting sound principles for expounding the language, so as to give effect to the intention, of the legislature; principles acted on for ages, by wise and learned men. It is useless for the legislature to speak, unless it be rightly understood; and if, as unfortunately too often happens in modern times, it do not give itself leisure to use plain and consistent language, it taxes judicial ingenuity needlessly, and by multiplying law-suits, grievously oppresses those classes whom it so improvidently affects.]

CHAPTER IX.

EQUITY, AND ITS RELATIONS TO LAW.

[In preceding chapters has been given an outline of the common and statute law of England: but there yet remains to be considered a co-ordinate system for administering justice, in matters relating to property,—that of EQUITY. The student will find in a subsequent chapter, a sketch of the rise and progress of this system: all that is here intended, is to afford him a general idea of the province of equity, and the leading principles regulating its administration, and indicating its relation to law. This is the more necessary, since many expressions of legal writers would lead to erroneous notions on this subject: "The very terms," says Blackstone, "of a court of *Equity*, and a court of *Law*, as contrasted with each other, are apt to mislead us: as if the one judged without equity, and the other was not bound by any law." The discretion of equity, however, in some cases follows the law implicitly; in others, assists it, and advances the remedy: in others, again, it relieves against the abuse, or allays the rigour of it: but in no case does it contradict or overturn the grounds or principles of law.* A great master of equity, the late lord Redesdale, has left us the following comprehensive and luminous sketch of our system of equity.

* Sir Joseph Jekyll, M.R.

["Early in the history of our jurisprudence, the administration of justice by the ordinary courts, appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles, upon which the ordinary courts also decide, when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, *and the positive law is silent*. The courts of equity also minister to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending litigation; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person, from the doubtful title of others; by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and without pronouncing any judgment on the subject, by compelling a discovery, which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation." *

[In the year 1854, a bold step was taken by the legislature, in "the Common Law Procedure Act 1854," tending seriously to affect the long established relations between the administration of law and equity: by arming the courts of law with powers till then wielded by courts of equity alone, and allowing equitable matter to be available in courts of law. On the other hand great and beneficial changes have been introduced into the administration of equity; rendering its

* Mitford's "Treatise of Pleading in the Courts of Chancery," p. 3.

proceedings, comparatively with their former conditions, simple and inexpensive; and introducing the *vivâ voce* examination of witnesses.

[The systems of jurisprudence in our courts of Law and Equity are equally fixed and positive, though varied in the forms of their proceedings. *Equity follows the Law*, as is said above: by which is to be understood, that the rules of property, the rules of evidence, and of interpretation, are the same in each: or each would be perpetually confounding and defeating the other. No one can understand or appreciate the objects and action of Equity, who is not equally well informed in respect of the Law.]

CHAPTER X.

COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

[1 Bla. Com. 93—120.]

I. THE kingdom of ENGLAND, over which our municipal laws have jurisdiction, includes not, *by the common law*, either Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the king's dominions, except the territory of England only. [Wales and Berwick-upon-Tweed were, however *statutably* declared (st. 20 Geo. II. c. 42, s. 3) to be comprehended in the word "England," when used in any act of parliament.] And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent [remote, *and widely scattered*] *countries*; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

II. WALES had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries: even from the time of the hostile invasions of the Saxons, when the ancient and Christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to Christianity, and

settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length, in the reign of Edward the First, who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became, as a matter of course, their titular prince; the territory of Wales being then entirely re-annexed, by a kind of feodal resumption, to the dominion of the crown of England; or, as the statute of Rhudlan expresses it, "*terra Walliæ cum incolis suis, prius regi jure feodali subjecta*, (of which homage was the sign) *jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ, tanquam pars corporis ejusdem, annexa et unita.*" By the statute also of Wales, very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity: particularly their rule of inheritance, viz., that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success, till she reduced all Italy to her obedience, by

admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Hen. VIII. c. 26,—1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales: besides many other regulations of the police of this principality. And the statute 34 and 35 Hen. VIII. c. 26. confirms the same, adds farther regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, hardly more than are to be found in many counties of England itself. [A statute passed in the year 1830 (1 W. IV. c. 70), which abolished the local courts previously existing in Wales, completed the assimilation of that part of the kingdom to England, and it is visited by the justices of assize like any other part of England: while, in 1832, the act for amending the representation of the people (2 W. IV. c. 45) made considerable changes in the parliamentary representation of Wales.]

III. The kingdom of SCOTLAND, notwithstanding the union of the crowns on the accession of their king, James VI., to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a great resemblance, though far from an identity, in their laws. By an act of parliament, 1 Jac. I. c. 1, it is declared that these two mighty, famous, and ancient kingdoms were formerly one. And sir Edward Coke observes how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent

of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of their ancient common law, is extremely similar to that of Glanvil, which contains the principles of ours, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

Though sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union, they were at length overcome, and the great work was happily effected, in 1707, in the fifth year of the reign of queen Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable, being as follows:—

1. That on the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be UNITED INTO ONE KINGDOM, by the name of GREAT BRITAIN.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l*. by a land-tax, Scotland shall raise 48,000*l*.

16, 17. The standards of the coin, of weights, and of

measures, shall be reduced to those of England, throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force: though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament: laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen to represent the peerage of Scotland for each parliament, and forty-five members to sit in the house of commons. [In the year 1832, the number of the latter was increased to fifty-three: thirty for counties, and twenty-three for towns.]

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers except sitting in the house of lords, and voting on the trial of a peer.

These are among the principal of the twenty-five *articles of union*, which are ratified and confirmed by THE STATUTE 5 Ann. c. 8: in which statute there are also TWO ACTS OF PARLIAMENT RECITED; the one of Scotland, whereby the church of Scotland, as will be hereafter shown, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6, whereby the acts of uniformity of 13 Eliz. and 13 Car. II. except as the same had been altered by parliament at that time, and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And

it is enacted, that these two acts "shall be for ever observed as fundamental and essential conditions of the union."

[The union with Scotland is a highly interesting passage in our annals, and worthy of being carefully studied. The inconveniences and dangers to be got rid of were many and pressing, yet the difficulty of doing so appeared almost insuperable. Nearly a century and a half having since elapsed, it is equally instructive and interesting to contemplate the predictions of the promoters and opponents of that great measure, which time has falsified, and verified. A peer in the Scottish parliament sternly and mournfully denounced the measure, as fraught with the degradation and ruin of his country. "Above all, I see our ancient mother Caledonia, like Cæsar, sitting in the midst of our senate, looking mournfully round, covering herself with her royal garment, and breathing out her last words, *and thou, too, my son!* while she attends the fatal blow from our hands." The earl of Nottingham, in the English parliament, declared solemnly, "if this union do pass, I may with much reason affirm, that I have outlived all the laws, and the very constitution, of England;" concluding with a prayer to God "to avert the dire effects which may probably ensue from such an incorporating union." Queen Anne, on the contrary, in commending the measure to the attention of parliament, told them that "she hoped the union would be a lasting blessing to the whole island, a great addition to its wealth and power, and a firm security to the protestant religion." On giving her assent to the Act, she made this dignified declaration. "I consider this union a matter of the greatest importance to the wealth, strength, and safety of the whole island; and at the same time, a work of so much difficulty and nicety in its own nature, that till now, all attempts which have been made towards it, in the course of above a hundred years, have proved ineffectual; and therefore I make no doubt, it will be remembered and spoken of hereafter, to the honour of those who have been

instrumental in bringing it to such a happy conclusion. I desire and expect from all my subjects, of both nations, that henceforth they act with all possible respect and kindness to one another; that so it may appear to all the world, they have hearts disposed to become one people. This will be a great pleasure to me, and will make us all quickly sensible of the good effects of this union. And I cannot but look upon it as a peculiar happiness, that in my reign so full provision is made for the peace and quiet of my people, and for the security of our religion, by so firm an establishment of the protestant succession throughout Great Britain." These queenly felicitations and predictions were deserved, and have been verified.]

The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and during such its subjection, it received from that prince a charter, which, after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England, was confirmed by king Edward III. Though therefore it hath some local peculiarities, derived from the ancient law of Scotland, yet it is clearly part of the realm of England; being represented by two burgesses in the house of commons, and bound by all acts in the British parliament, whether specially named or otherwise.

IV. As to Ireland, the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons. But king John, in the twelfth year of his reign, went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England: which letters patent sir Edward Coke, apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish

were averse to conform, and still stuck to their Brehon law: so that both Henry III. and Edward I. were obliged to renew the injunction;' and at length in a parliament holden at Kilkenny, 40 Edward III. under Lionel, duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Elizabeth, the wild natives kept and preserved their Brehon law; which is described to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity in determining the right between party and party, but in many things repugnant quite both to God's laws and man's." The latter part of this character alone is ascribed to it, by the laws before cited of Edward I. and his grandson.

But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law of England, were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom, unless it were specially named, or included under general words, such as, "within any of the king's dominions."

The Irish nation being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, in the fourteenth year of Henry VII., by Poynings' laws,—so called after sir Edward Poynings, then lord deputy,—that all acts of parliament, *before* made in England, should be of force within the realm of Ireland.

[On the 1st of January, 1801, Ireland was united to Great Britain by statute 39 & 40 Geo. III., c. 67, passed on the 12th July, 1800, entitled "An Act for the Union of Great

Britain and Ireland," which recites its object to be "to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British empire, by such measures as may tend to unite the two kingdoms into one, in such manner and on such terms as may be established by the acts of their respective parliaments." On the day when the union took effect, in compliance with the first article, a royal declaration was issued, concerning the style and titles appertaining to the imperial crown of Great Britain and Ireland, as well as to its ensigns, armorial flags, and banners. The *fleur-de-lis* was omitted, as well as the title "King of France," which had been till then retained; and the royal dignity was in future to be expressed in the Latin tongue,—*Dei gratiâ, Britanniarum Rex, Fidei Defensor*; and a new standard was hoisted in each capital, containing the three crosses of St. George, St. Andrew, and St. Patrick.

[The chief articles of the union are as follows:—

[Art. I. Provides, that the kingdoms of Great Britain and Ireland shall, on the 1st day of January 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland; and that the royal style and titles appertaining to the imperial crown of the said united kingdom and its dependencies, and also the ensigns, armorial flags, and banners thereof, shall be such as his Majesty, by his royal proclamation under the great seal of the united kingdom, shall be pleased to appoint.

[Art. II. Provides, that the succession to the imperial crown shall continue settled as before limited.

[Art. III. Provides, that there shall be one parliament, styled, The Parliament of the United Kingdom of Great Britain and Ireland.

[Art. IV. Provides, that four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected *for life* by the peers of Ireland, shall sit in the house of lords; and one hundred [now one hundred

and five] commoners, two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity college, and one for each of the thirty-one most considerable cities and boroughs, shall be the number to sit in the house of commons on the part of Ireland.

[That a peer of Ireland, not elected one of the twenty-eight, may sit in the house of commons; but that whilst he continues a member of the house of commons, he shall not be entitled to the privilege of peerage, nor capable of being elected one of the twenty-eight peers, nor of voting at such election, and he shall be sued and indicted for any offence as a commoner.

[That as often as three of the peerages of Ireland, existing at the time of the union, shall become extinct, the king may create one peer of Ireland; and when the peers of Ireland are reduced to one hundred, by extinction, or otherwise, exclusive of those who shall hold any peerage of Great Britain subsisting at the time of the union, or created of the united kingdom since the Union, the king may then create one peer of Ireland for every peerage that becomes extinct, or as often as anyone of them is created a peer of the united kingdom, so that the king may always keep up the number of one hundred Irish peers, over and above those who have an hereditary seat in the house of lords.

[That the qualifications by property of the representatives in Ireland, shall be the same respectively as those for counties, cities, and boroughs in England, unless some other provision be afterwards made.

[That all the lords of parliament on the part of Ireland, spiritual and temporal, sitting in the house of lords, shall have the same rights and privileges respectively as the peers of Great Britain; and that all the lords spiritual and temporal of Ireland, shall have rank and precedency next and immediately after all the persons holding peerages of the like order and degree in Great Britain, subsisting at the time of the union: and that all peerages hereafter

created of Ireland, or of the united kingdom, of the same degree, shall have precedency according to the dates of their creations; and that all the peers of Ireland, except those who are members of the house of commons, shall have all the privileges of peers as fully as the peers of Great Britain, the right and privileges of sitting in the house of lords, and upon the trial of peers, only excepted.

[Art. V. Provides, that the churches of England and Ireland shall be united into one protestant episcopal church, to be called, The United Church of England and Ireland; that the doctrine and worship shall be the same; and that the continuance and preservation of the united church, as the established church of England and Ireland, shall be deemed an essential and fundamental part of the Union; and that in like manner the church of Scotland shall remain the same as is now established by law, and by the acts of union of England and Scotland.

[Art. VI. Provides, that the subjects of Great Britain and Ireland shall be entitled to the same privileges with regard to trade and navigation, and also in respect of all treaties with foreign powers.

[Art. VII. Provides, that the expenditure of the United Kingdom shall be defrayed in such proportions as parliament may from time to time deem reasonable.

[Art. VIII. Provides, that all the laws and courts of each kingdom, shall remain the same as already established, subject to such alterations by the united parliament, as circumstances may require; but that all writs of error and appeals shall be decided by the house of lords of the united kingdom.

[Since the union, all acts of parliament extend to Ireland, unless it be excepted expressly, or by necessary implication.

[Statute 2 & 3 W. IV. cap. 88. (passed in the year 1832), gave five additional members to Ireland, one to each of the

following places, viz.:—Limerick, Waterford, Belfast, Galway, and the University of Dublin.

[The great measure of the Union, was carried after even a more arduous struggle than in the case of Scotland. It changed the frame of the representative body, and the political constitution of the most highly valued of the British dominions. An alteration of such magnitude could not be effected, on a sudden, in two kingdoms where free discussion and publication existed, without strenuous expressions of opposite opinions; and the history of the transaction is deeply interesting. When, at length, King George III. gave his assent to the bill, he declared, like Queen Anne in the case of the Scottish Union, that he should "ever consider that great measure as the happiest event of his reign; being persuaded that nothing could so effectually contribute to extend to his Irish subjects, a full participation of the blessings derived from the British constitution, and to establish on the most solid foundation the strength, prosperity, and power of the whole empire." Unlike the case of Scotland, and arising from peculiar causes which it is hoped may have ceased to exist, some attempts have been made, during the last fifteen years, to repeal this union, on the alleged ground that it had been effected by corruption, and had occasioned only misery and degradation to Ireland. The attempts were, however, resisted by the whole force of the empire, and are not likely to be renewed. The interests of Great Britain and Ireland are identical; and those of the latter have ever since largely occupied the attention of the Imperial Legislature. A review, by one of the leading statesmen of the age, of the benefits conferred on Ireland since the union, may be found in the debate in the House of Commons, on the 11th July, 1843.]

With regard to the other ADJACENT ISLANDS * which are subject to the crown of Great Britain, some of them, as the

* It appears from the census of 1851, that Great Britain and Ireland may be regarded as the greatest two of a multitude of islands and rocks,

isle of Wight, of Portland, of Thanet, &c., are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. [The first of these, in the year 1832, was severed from the county of Hants, and made a separate county, for the purpose of returning a member to parliament, in addition to two for the borough of Newport, within the island.] There are, however, certain of the islands which require a more particular consideration.

And, first, THE ISLE OF MAN is a distinct territory from England, and not governed by our laws: neither does any act of parliament extend to it, unless it be particularly named therein. It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland, and then again to the crown of England; and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted, by the name of the lordship of Man, to sir John de Stanley, by letters patent 7 Henry IV. In his lineal descendants it continued for eight generations. The distinct jurisdiction of this little subordinate royalty, which existed for a long series of years, being found inconvenient for the purposes of public justice, and for the revenue,—it affording a commodious asylum for debtors, outlaws, and smugglers,—authority was given to the treasury, by parliament, to purchase the interest of the then proprietors, for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by stats. 5 Geo. III. c c. 26 & 39; whereby the whole island and its dependencies, except the landed property and certain other rights of the

five hundred in number: of which only 175 were found inhabited, and some of them very scantily, on the day of the census.

Atholl family, are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

The islands of JERSEY, GUERNSEY, SARK, ALDERNEY, and their appendages, were parcel of the duchy of Normandy, and united to the crown of England by the first princes of the Norman line. They are governed by their own laws, for the most part the ducal customs of Normandy; being collected in an ancient book of great authority, entitled, *le grand coustumier*. They are not bound by acts of our parliaments, unless particularly named. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the queen in council [that is, to the judicial committee of the privy-council] in the last resort.

Besides these adjacent islands, our DISTANT PLANTATIONS IN AMERICA, and ELSEWHERE, are in some respect subject to the English laws. [It is hardly necessary to remind the reader that, since this was written, the independence of the United States of America was recognised by this country, in the year 1783. We have also since acquired immense possessions in India and elsewhere, in every quarter of the globe, as will be presently explained.] Plantations or colonies, in distant countries, are either where the lands are claimed by right of occupancy only,—by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great

restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation, and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue,—such especially as are enforced by penalties,—the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature of the mother country. But in conquered or ceded countries, that have already laws of their own, the queen may indeed alter and change those laws; but, till she does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in these commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea.—The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law. This main sea begins at the low-water mark; but between the high-water mark, and the low-water mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate

jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb. [Offences committed on the High Seas, and other places within the jurisdiction of the Admiralty, can now be tried in the Central Criminal Court in London, or before any judge of assize, by virtue of stats. 4 & 5 Will. IV. c. 36, and 7 & 8 Vict. c. 2.]

The TERRITORY of ENGLAND is liable to two divisions; the one ECCLESIASTICAL, the other CIVIL.

1. The *Ecclesiastical* division is, primarily, into two *Provinces*, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan * bishops; whereof Canterbury includes twenty-one, and York three: besides the bishopric of the Isle of Man, which was annexed to the province of York by king Henry VIII.† Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.

A parish *is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein.* These districts are computed to be near ten thousand in number.‡ How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute

* i.e., Subordinate to an archbishop.

† The whole number of bishoprics, including the two recently created (Ripon and Manchester), is now twenty-six.

‡ In 1831 the number of parishes and parochial chapelries were computed at about 10,700. In 1851 the number of churches and chapels was 10,477.

his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.

Mr. Camden says that England was divided into parishes by Archbishop Honorius, about the year 630; but sir Henry Hobart lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each widely differs from the other, and both of them perhaps from the truth; which will probably be found in the medium, between the two extremes. For Mr. Selden has clearly shown, that the clergy lived in common, without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time, the consecration of tithes was in general arbitrary; that is, every man paid his own, as was before observed, to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of king Edgar, that *dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.* However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case all his

tithes were ordained to be paid to the *primariæ ecclesiæ*, or mother-church.

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor, or manors: since it seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. This will well enough account for the frequent intermixture of parishes one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and their tithes are now, by immemorial custom, payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church.

[In the year 1818, the legislature laudably bestirred itself

about extending the usefulness of the Church of England, so as to make it more commensurate with the exigencies of the age. By acts passed in that year, and frequently since, a body corporate has been called into existence entitled "Her Majesty's Commissioners for building New Churches," who are armed with ample powers to carry into effect the object proposed; for remodelling the existing divisions of parishes for ecclesiastical purposes; creating new ecclesiastical districts, called district parishes; uniting parts of contiguous parishes, and extraparochial places, into consolidated chapelries; assigning particular districts to churches and chapels already existing, and converting vicarages into rectories. Besides all this, in the year 1835, another great movement was made by the legislature, by the appointment of "The Ecclesiastical Commissioners" for improving our ecclesiastical system, remodelling dioceses, redistributing their revenues, uniting and severing benefices, and effecting many other important objects, for which recourse has been had to subsequent statutes.*] Thus much for the ecclesiastical division of this kingdom.

2. The *Civil* division of the territory of England is into counties; of those counties into hundreds; of those hundreds into tithings, or towns. This division, as it now stands, seems to owe its original to king Alfred: who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called from the Saxon, because *ten* freeholders, with their families, composed one. They all dwelt together, and were sureties, or free pledges, to the king, for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming. And therefore, anciently, no man was suffered to abide in England above forty days, unless he were enrolled in some tithing, or decennary. One of the principal inhabitants of the tithing is annually ap-

* A lucid account of all these salutary and extensive changes may be seen in Steph. Comm., vol. iii. pp. 102—116.

pointed to preside over the rest, being called the tithing-man, the headborough (words which speak their own etymology), and in some countries the borsholder, or borough's ealder, being supposed the discreetest man in the borough, town, or tithing.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff; and formerly there was regularly held in it the hundred court, for the trial of causes, though now fallen into disuse. In some of the more northern counties, these hundreds are called wapentakes.

An indefinite number of these hundreds make up a county, or shire. Shire is a Saxon word, signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman, as the Saxons called him, of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve or shire-reve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds a-piece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into three of these intermediate jurisdictions, they are called trithings, which were anciently governed by a trithing reeve. These trithings still subsist in the large county of York, where, by an easy corruption, they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales have been different at different times; at present they are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, are called COUNTIES PALATINE. The two former are such by prescription, or immemorial custom; or, at least as old as the Norman conquest; the latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster; whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament, to honour John of Gaunt himself; whom, on the death of his father-in-law, the king had also created duke of Lancaster. Counties palatine are so called, *a palatio;* because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it. [None of the counties palatine is now in the hands of a subject; and in recent years, such important changes in the administration of justice have been effected in each, as to leave little or no distinction between them and the rest of England.]

There are also counties *corporate:* which are certain cities and towns, some with more, some with less territory annexed to them: to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, Hull, and many others. And thus much of the countries subject to the laws of England.

[A consideration of the *countries* subject to the laws of England, involves that of the *persons* to whom such laws are applicable; for all within those countries are subject to these laws, though in different degrees. The distinction between British subjects and aliens, and the means by which the latter may be naturalised, will be explained hereafter.

[The Queen of England is now the ruler, since our recent acquisitions in India, over a hundred and seventy millions of human beings! The British Empire is, in fact, at this moment, the most extensive in the world. Though losing its American colonies, it has made most rapid increase within the last century. It consists, in EUROPE, of Great Britain and Ireland, Gibraltar, Malta, the Ionian isles (of which the Queen of England is sovereign protector), and that of Heligoland; in ASIA, of India and Ceylon; in AUSTRALASIA, of New South Wales and Van Diemen's Land; in AFRICA, of the Cape of Good Hope, Sierra Leone, Gambia, and the Mauritius; and in AMERICA, of the Canadas, Nova Scotia, New Brunswick, Prince Edward's Island, Cape Breton, Newfoundland, etc.; of the Bermudas and the West Indian Islands; and British Guiana on the southern continent. The proper government of such immense dominions, necessarily occasions profound solicitude; and requires the greatest vigilance, moderation, firmness, and wisdom, on the part of the Queen of England, and her statesmen.]

CHAPTER XI.

ABSOLUTE RIGHTS OF INDIVIDUALS, GENERALLY.

[1 Bla. Com., pp. 122—127.]

As municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero, and after him our Bracton, have expressed it, *sanctio justa jubens honesta, et prohibens contraria;* it follows, that the primary and principal objects of the law, are *rights* and *wrongs*. Adopting this simple and obvious division, let us in the first place, consider the rights that are commanded, and secondly, the wrongs that are forbidden, by the laws of England.

RIGHTS are, however, liable to another subdivision; being either, first, those which concern, and are annexed, to the persons of men, and are then called *jura personarum*, or the rights of persons; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum*, or the rights relating to things. WRONGS are also divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called 'civil injuries;' and secondly, public wrongs, which, being a breach of general public rights, affect the whole community, and are called 'crimes' and 'misdemeanors.'*

* There is no legal distinction between a crime and a misdemeanor,

The rights of persons that are commanded to be observed by the municipal law, are of two sorts: first, such as are due from every citizen, which are usually called civil duties; and secondly, such as belong to him, as such, which is the more popular acceptation of rights, or *jura*. Both may indeed be comprised in this latter division; for as all social duties are of a relative nature, at the same time that they are due from one man, or set of men, they must also be due to another. But I apprehend that it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons, also, are divided by the law into either natural persons, or artificial. *Natural* persons are such as the God of nature formed us: *artificial* persons are such as are created and devised by human laws, for the purposes of society and government, and which are called 'corporations' or 'bodies politic.'

The rights of persons, considered in their natural capacities, are also of two sorts, absolute, and relative. *Absolute*, which are such as appertain and belong to particular men, merely as individuals or single persons: *relative*, which are incident to them as members of society, and standing in various relations to each other.

By the *absolute rights of individuals*, we mean, those which are so in their primary and strictest sense; such as would belong to their persons, merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*

the former word including the latter. A crime is an offence, and offences consist of felonies and misdemeanors, as will be fully explained hereafter.

which a man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social, or relative duties. Let a man, therefore, be ever so abandoned in his principles, or vicious in his practice, provided he keep his wickedness to himself, and do not offend against the rules of public decency, he is out of the reach of human laws. But if he make his vices public, though they be such as principally affect himself, as drunkenness or the like, they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication, is what alters the nature of the case. Public sobriety is a relative duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But with respect to rights, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society, is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance and intercourse, gained by the institution of social and friendly communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration.

And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security. [Here, however, it must be borne in mind, that the line of demarcation between LAW and ETHICS must be strictly observed, and internal actions not made the objects of law. This doctrine was fully recognised by the Romans: whence the maxim *interna non curat prætor*. The violation of this fundamental principle, opens instantly a wide door to the most arbitrary and injurious violation of the rights of individuals, by the ruling power. Wherever the judicial power is allowed to encroach too far on the widely-extended domain of moral duties, that judicial power is in danger of becoming inconsistent, and unjust.]

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated, *the natural liberty of mankind*. This natural liberty consists, properly, in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man, at his creation, when he endowed him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which

the community has thought proper to establish. And this species of legal obedience and conformity, is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment, would wish to obtain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals, in any of the enjoyments of life. *Political*, therefore, *or civil liberty*, which is that of a member of society, is no other than *natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public.* Hence we may collect, that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom, in others of more importance; by supporting that state of society, which alone can secure our independence.

The idea and practice of this political or civil liberty, flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can be lost or destroyed by the folly only, or demerits, of its owner; the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing, even in the humblest subject. Very different are the modern constitutions of other states, on the continent of Europe, and the genius of the imperial law: which in general

are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman. [Such, also, is the law of France. On the 6th May, 1840, it was solemnly decided by the Court of Cassation, to be an ancient and fundamental maxim of the law of France, "that every slave was free from the moment that he put his foot on the soil of France."

[Though the condition of slavery has been long pronounced thus repugnant to the spirit and genius of our laws, it was not till the year 1806 that the British public, horrified by revelations concerning the true nature of the slave trade, prohibited the supply of Foreign States with slaves, by and on account of British subjects, by stat. 46 Geo. III. c. 52. In the ensuing year the supply of slaves from the coast of Africa to our own plantations, was prohibited by stat. 47 Geo. III. sess. 1, c. 36. Finally, in the year 1833, by stat. 3 & 4 Will. IV. c. 73, slavery was abolished in all the British colonies themselves: making humane provisions for promoting the industry of the manumitted slaves; and according to those thereby deprived of the services of such slaves, the sum of twenty millions sterling. Of this national act, one of the leading divines* in the United States of America has witten thus:—

"Great Britain, loaded with an unprecedented debt, and with a grinding taxation, contracted a new debt of a hundred millions of dollars, to give freedom, not to Englishmen, but to the degraded African! I know not that history records an act so disinterested, so sublime. In the progress of ages, England's naval triumphs will shrink into a more and more narrow space: in the records of our race, this moral triumph will fill a broader, brighter page."]

* Dr. Channing.

CHAPTER XII.

ABSOLUTE RIGHTS OF THE INHABITANTS OF GREAT BRITAIN.

[1 Bla. Com. pp. 127—144.]

THE absolute rights of every Englishman, which, taken in a political and extensive sense, are usually called, 'their liberties,' as they are founded on nature and reason, so are coeval with our form of government, though subject at times to fluctuate and change: their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments, and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; *and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.*

First, by the GREAT CHARTER [Magna Charta] of liberties, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry III., his son. Which charter contained very few new grants; but, as sir Edward Coke

observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards, by the statute called CONFIRMATIO CARTARUM [25 Edw. I.] whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those who by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (sir Edward Coke, I think, reckons thirty-two), from the first Edward, to Henry IV. Then, after a long interval, by THE PETITION OF RIGHT,* which was a parliamentary declaration of the liberties of the people, assented to by king Charles I., in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the HABEAS CORPUS Act [31 Car. II. c. 2] passed under Charles II. [It is altogether erroneous to suppose, as many do, that this act introduced a new principle into our laws, or conferred any right on the subject. Magna Charta had abundantly provided against arbitrary imprisonment, long before: but the *Habeas Corpus* act was necessary to cut off the abuses with which it had become encrusted by subtle tyranny.] To these succeeded the BILL OF RIGHTS, or declaration delivered by the lords

* 3 Car. I., c. 1. It was called "The Petition" from its being drawn in the form not of an Act of Parliament, but of a petition, and is headed—"The Petition exhibited to His Majesty by the Lords Spiritual and Temporal, and Commons, concerning divers RIGHTS and LIBERTIES of the Subjects, with His Majesty's Answer thereto." After reciting four great rights, and recent infringements of them, the petitioners pray that all such illegal acts be annulled, and never done for the future, but that "their *rights* and liberties, according to the laws and statutes of this realm," should be for the future strictly observed. To which the King replied, in full parliament, "*Soit droit fait come est désiré.*"

H 2

and commons to the prince and princess of Orange, 13th February, 1688: and afterwards enacted in parliament, [stat. 1. Will. & Mary, sess. 2, c. 2,] when they had become king and queen: which declaration concludes in these remarkable words; "AND THEY DO CLAIM, DEMAND, AND INSIST UPON, ALL AND SINGULAR THE PREMISES, AS THEIR UNDOUBTED RIGHTS AND LIBERTIES." And the act of parliament itself recognises "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom."* Lastly, these liberties were again asserted at the commencement of the eighteenth century, in the ACT OF SETTLEMENT, whereby the crown was limited to his present majesty's [George III.] illustrious house; and some new provisions were added, at the same fortunate era, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.

Thus much for the DECLARATION of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these

* Lord Chatham called these three,—Magna Charta, the Petition of Rights, and the Bill of Rights, "The Bible of the English Constitution," to which appeal is to be made on every grave political question: and England cannot go far wrong if his advice be followed, in both the letter and spirit.

may be reduced to three principal or primary articles: the right of *personal security*, the right of *personal liberty*, and the right of *private property;* because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities, in their largest and most extensive sense.

I. The right of PERSONAL SECURITY, consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1 & 2. Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.

These rights, of life and member, can be determined by only the death of the person; which was formerly accounted to be either a civil, or a natural, death. The civil death commenced, if any man was banished, or abjured the realm, by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life, and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and

executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate.

3. Besides those limbs and members which may be necessary to a man, in order to defend himself, or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults [and injuries] of menaces, assaults, beating, and wounding, though such insults [and injuries] amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it, [as by nuisances, supplying unwholesome food, or gross negligence and ignorance of medical practitioners,] and,

5. The security of his reputation, or good name, from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these, it is impossible to have the perfect enjoyment of any other advantage or right. [Defamation by word of mouth, is termed slander: by writing, print, or picture, libel. The former is remediable only by an action for damages,—trifling actions, however, being severely discouraged; the latter, by either an action for damages, or an indictment. By a recent statute, 6 and 7 Vict. c. 90., passed, for the better protection of private character, more effectually securing the liberty of the press, and better preventing abuses in exercising that liberty, several valuable enactments are made to secure these ends as will be hereafter explained.]

II. Next to personal security, the law of England regards, asserts, and preserves, the PERSONAL LIBERTY of individuals. This personal liberty consists in the power of locomotion,—of changing one's situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law. Concerning which we may make the same observations

as upon the preceding article; that it is a right strictly natural; and, that in this kingdom, it can never be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here, again, the language of the greater charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned, by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car I. c. 10, if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus act*, and another statute, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires, and justifies, such detainer. And, lest this act should be evaded, by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2, that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily, whomever he or his officers thought proper, there would soon be an end of all other rights and immunities. Some

have thought, that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet, sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorise the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing; * as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatûs consultum ultimæ necessitatis.* In like manner this expedient ought to be tried only in cases of extreme emergency; and in these, the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or

* The title of such an Act is "An Act to empower Her Majesty to secure and detain such persons as Her Majesty shall suspect are conspiring against her person and government."

forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seal a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must be either by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, *in order to be examined into, if necessary, upon a habeas corpus.* If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it, unless by the sentence of the law. The queen indeed, by her royal prerogative, may issue out her writ *ne exeat regno*, and prohibit any of her subjects from going into foreign parts, without licence. This may be necessary for the public service, and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can lawfully send any subject of England out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the

express direction of some modern act of parliament. To this purpose the great charter declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. [In the year 1853, in consequence of "the difficulty of transporting offenders beyond the seas" *penal servitude*, at home or abroad, was substituted for transportation, in all cases except those for which fourteen years' transportation, and upwards, might be awarded. Stat. 16 & 17 Vict. c. 99.]

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the queen may command the attendance and service of all her liegemen, yet she cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: [nor can a militia man be sent on foreign service except under the authority of an act of parliament such as was passed for that purpose in the year 1855, stat. 18 & 19 Vict. c. 1.] The queen cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of PROPERTY: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. This original of private property, which will be spoken of hereafter, is probably founded in nature; but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle, the great charter has declared that no

freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.*

So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even

* i.e. It shall *go for nothing*—be void.

this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. [The principle enunciated in the text, has been very severely tried, since the introduction of railroads; the projectors of which have been invested with compulsory powers of taking lands and houses, for ages in the possession of the owners and their ancestors; and with which no consideration but that of the irresistible will of the legislature, could have induced them to part. This renders it the sacred duty of parliament, to require the strongest proof of the public benefit to be secured by such an exercise of its power; and almost every abandoned, or only partially useful, railroad, may be regarded as a standing rebuke to parliament, for the inconsiderate and improvident exercise of its power to interfere with private rights of property. *The Irish Encumbered Estates Act* of 1848 * again may be cited, as a bold and remarkable instance of legislative interference with private rights of property; of which its owners are stripped, with or without their will, with a view to objects of social and political utility; by releasing land from the complicated pecuniary liabilities with which it is '*encumbered*,' and substituting as the subject matter of those liabilities, the money arising from the sale of the land, thus again rendered freely alienable. By the operation of this Act, a vast portion of Ireland has already changed owners.]

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.

It was made an article in the petition of right, 3 Car. I., that no man shall be compelled to yield any gift, loan, or

* 11 & 12 Vict., c. 48. passed on the 14th August, 1848.

benevolence, tax, or such like charge, without common consent by act of parliament. And by stat. 1 Will. & Mary, sess. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner than the same is or shall be granted, is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of PARLIAMENT.

2. The limitation of the queen's PREROGATIVE, by bounds, so certain and notorious, that it is impossible she should either mistake or legally exceed them, without the consent of the people. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty; the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice, for redress of injuries. Since the law is, in England, the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*, spoken in the person of the king, who in judgment of law, says sir Edward Coke, is ever present and repeating them in all his courts, are these, *nulli vendemus, nulli*

negabimus, aut differemus rectum, vel justitiam: "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the affirmative acts of parliament, wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know, if he pleases: for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament.

4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the RIGHT OF PETITIONING the queen, or either house of parliament, for the redress of grievances. The restrictions, for some there are, which are laid upon petitioning in England, while they promote the spirit of peace, are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult.

5. The fifth auxiliary right of the subject is that of having ARMS for their defence, suitable to their condition and degree, and such as are allowed by law. [This right is also declared by the Bill of Rights, and by stat. 1 Will. & Mary, sess. 2, c. 2: and it is, indeed, a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression. "The right of British subjects to possess arms," said the secretary of state, in one of the discussions on the bill which afterwards became stat. 6 & 7 Vict. c. 74. (the Irish

Arms Act), "must be admitted to be one of the noble and distinguishing marks of their freedom: a right, the possession of which is one of great value, and to put it under restraint is a matter of very grave consideration." Immediately before the tyrant, Richard III., ascended the throne, he issued a proclamation (Harl. Miscell., Nos. 433 & 239) that none but those licensed, should bear any manner of weapon, on pain of imprisonment.

[6. May be mentioned the free exercise and enjoyment of religious profession and opinion, and the tender consideration of the legislature for every conscientious scruple, as far as is consistent with the public interests.

[Finally, a British subject is free as the air to say, write, print, and publish, whatever he pleases, provided, however, it do not injure, or tend to injure, individuals, or the public, or blasphemously offend Almighty God. Whether a man be liable to any of these imputations, depends on the established law of the land, and the opinion of an impartial jury of his equals. Words are not weighed, however, in England, in golden scales, or stretched on the rack of a capricious, corrupt, or tyrannical censorship: but the liberty of the press is regarded as the very atmosphere of freedom, —the grand safeguard of all other liberties.]

In these several articles consist the rights, or, as they are frequently termed, the liberties, of Englishmen,—liberties more generally talked of, than thoroughly understood,—and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded, should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression, must act in opposition

to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour: and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; next, to the right of having and using arms for self-preservation and defence; [and finally, to the right of resistance to existing authority, in those extreme cases which justify the governed, in regarding the governor as having broken the fundamental compact between them.] And all these rights and liberties it is our birthright to enjoy entire, unless where the laws of our country have laid them under necessary restraints: restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do, and are restrained from nothing, but what would be pernicious to either ourselves or our fellow-citizens. So that this review of our situation may fully justify the observation of a learned French author, Montesquieu, who indeed generally both thought and wrote in the spirit of genuine freedom; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. [This section cannot be better ended than with the weighty words of that great philosophic divine, Bishop Butler,* which are worthy the profound meditation of all men.

"Civil liberty, the liberty of a community, is a severe and

* Sermon preached before the House of Lords, January 30, 1740-1.

restrained thing: implies, in the notion of it, authority, settled subordination, subjection, and obedience; and is altogether as much hurt by too little of this kind, as by too much of it. And the love of liberty, when it is indeed the love of liberty, which carries us to withstand tyranny, will as much carry us to reverence authority, and support it,—for this most obvious reason, that one is as necessary to the very being of liberty, as the other is destructive of it. And therefore, the love of liberty which does not produce this effect, the love of liberty which is not a real principle of dutiful behaviour towards authority, is as hypocritical as the religion which is not productive of a good life. Licentiousness is, in truth, such an excess of liberty, as is of the same nature with tyranny. For what is the difference between them, but that one is lawless power exercised under the pretence of authority, or by persons invested with it, the other lawless power exercised under pretence of liberty, or without any pretence at all? A people, then, must always be less free in proportion as they are more licentious: licentiousness being not only different from liberty, but directly contrary to it,—a direct breach upon it."]

CHAPTER XIII.

CONSTITUTION OF THE BRITISH PARLIAMENT.

[1 Bla. Com., pp. 146—160.]

The most universal public relation,* by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as a legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the

* As to the three great Relations in Private Life, *vide post.*

liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of queen, lords, and commons; the other executive, consisting of the queen alone.—We will here consider the British Parliament; in which the legislative power, and, of course, the supreme and absolute authority of the state, is vested by our constitution.

Parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. It is not necessary, however, here to enter into controversies of this sort. I hold it sufficient, that it is generally agreed, that in the main, the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III.; there being still extant writs of that date, to summon knights, citizens, and burgesses to parliament. I proceed, therefore, to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of six hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling; secondly, its constituent parts; thirdly, the laws and customs relating to parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs relating to each house separately and distinctly taken; sixthly, the methods of proceeding, and of making statutes, in both houses; and

lastly, the manner of the parliament's adjournment, prorogation, and dissolution.*

I. As to the manner and time of assembling. The parliament is regularly to be summoned by the queen's writ, or letter, issued out of chancery by advice of the privy council, and directed to the lord chancellor, commanding him to issue under the great seal, such and so many writs as have been usual and customary, for the purpose of calling a new parliament. [Magna Charta assigned a period of forty days for the period of the summons to Parliament; and by statute 7 & 8 Will. III. c. 25, it was also required that such an interval should elapse between the teste, and the return, of the writ of summons. Since the union with Scotland, a longer period was allowed in respect of the greater distance to be travelled by the northern representatives; a like reason operating after the union with Ireland. Fifty days were allowed for this purpose; but the more rapid transit of modern days has led to that period being reduced, by statute 15 & 16 Vict. c. 23, to thirty-five days. By that act "not less than *thirty-five* days" must now intervene, between the date of the royal proclamation, appointing a time for the first meeting of Parliament after a dissolution, and the day of such meeting.] It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any except the queen alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body,—the part assembled, or that which stays away? It is therefore necessary that the parliament should be *called together* at a determinate time and place;

* These subjects will be comprised in several of the succeeding chapters.

and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and, of the three constituent parts, this office can appertain to the queen only; as she is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act, at a time when no parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor; for this revived parliament must have been originally summoned by the crown.

And this summons, by the ancient statutes of the realm, the queen is bound to issue every year, or oftener, if need be. Not that she is, or ever was, obliged by these statutes to call a new parliament every year; but, only to permit a parliament to sit annually, for the redress of grievances, and despatch of business, if need be. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them together, sometimes for a very considerable period, under the pretence that there was no need of them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2. c. 2, it is declared to be one of the rights of the people, that for the redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently. This indefinite frequency is again reduced to a certainty, by statute 6 W. & M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years after the determination of the former. [Though it is by the

act of the crown, only, that Parliament can be assembled, its annual meeting is practically placed beyond the control of the royal authority, by the practice of providing money for the public service, by annual enactments: and also by the annual mutiny, and other acts, expiring with the year, unless renewed by parliament.]

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the queen's majesty, sitting there in her royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, who sit together with the queen, in one house, and the commons, who sit by themselves in another. And the queen and these three estates, together, form the great corporation or body politic of the kingdom, of which the queen is said to be *caput, principium, et finis.* For upon their coming together the queen meets them, either in person or by representation; without which there can be no beginning of a parliament; and she also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse

oppression than any they pretended to remedy. To hinder therefore any such encroachments, the queen is herself a part of the parliament; and, as this is the reason of her being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting, rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power, of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein, indeed, consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the queen is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds, by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct, not indeed of the queen, which would destroy her constitutional independence: but, which is more beneficial to the public, of her evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses, naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole

is prevented from separation, and artificially connected together, by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The queen's majesty will be considered at large, hereafter.

The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops * [with four Irish lords spiritual by rotation of sessions]; and these hold, or are supposed to hold, certain ancient baronies under the queen: for William the Conqueror thought proper to change the spiritual tenure of frankalmoign, or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt: and in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords. But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of The lords; they intermix in their votes; and the majority of such intermixture binds both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords spiritual

* It has been already stated (ante, p. 52, note) that there are now twenty-six English bishops, but only twenty-four have seats in the House of Lords.

and temporal are now in reality only one estate: which is unquestionably true in every effectual sense, though the ancient distinction between them, still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden and sir Edward Coke give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though sir Edward Coke seems to doubt whether this would not be an ordinance, rather than an act of parliament.

The lords temporal consist of all the peers of the realm, (the bishops not being in strictness held to be such, but merely lords of parliament,) by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers, who represent the body of the Scots nobility; [and of the twenty-eight peers who represent the Irish nobility.] * The number of temporal peers is indefinite, and may be increased at will, by the power of the crown. [But that power, though a salutary one, to be held *in terrorem*, is not to be exercised lightly, in order to influence proceedings in parliament, as in the reign of queen Anne: who suddenly created twelve peers together, in order to carry a particular measure; a step which cannot be viewed without apprehension and dissatisfaction, as inconsistent with the spirit of the constitution, for many grave reasons. Lord Brougham has placed on record † a very remarkable statement: that when he was lord chancellor, and the bill

* The Scotch peers, it will have been seen, are elected for only one parliament, the Irish peers for life. Ante, pp. 45, 47.

† Political Philosophy, c. 29.

for reforming the representation was likely to be rejected in the house of lords, king William IV. had conferred on the government "the power of an unlimited creation of peers at any stage of the measure;" that when he went to Windsor, with earl Grey, he "had with him a list of EIGHTY creations, framed on the principle of making the least possible permanent addition to the house and the aristocracy, by calling up peers' eldest sons, Scotch and Irish peers, and men without any families:"—but that such was "his deep sense of the dreadful consequences of the act" that he was disposed rather to risk the public confusion likely to ensue the rejection of the bill; and earl Grey shared his opinion as to "the perilous creation." The necessity was averted by a number of peers withdrawing from the house, while the bill was passing through it.]

The COMMONS consist of all such men of property in the kingdom, as have not seats in the house of lords; every one of whom has a vote in parliament, either personally, or by his representatives. In a free state, every man who is supposed a free agent, ought to be, in some measure, his own governor; and therefore a branch, at least, of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus, when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter; and, from that time, all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their

country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights elected by the proprietors, [and now, also, by leaseholders, and occupiers,] of lands: the cities and boroughs are represented by citizens and burgesses chosen by the mercantile part, or supposed trading interests, of the nation. And every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the commonwealth; to advise her majesty, as appears from the writ of summons, *de communi consilio super negotiis quibusdam arduis et urgentibus, reginam, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ, concernentibus.* And therefore he is not bound to consult with, or take the advice of his constituents, upon any particular point, unless he himself think it proper or prudent so to do.

These are the constituent parts of a parliament; the king, or queen regnant, the lords spiritual and temporal, and the commons: parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one or by two, only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though in the time of the great rebellion, the commons once * passed a vote, "that whatever is enacted or declared for law by the commons in parliament assembled, hath the force of law, and all the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto;" yet,

* 4th January, 1648.

when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1, that if any person shall maliciously or advisedly affirm, that both, or either of the houses of parliament, have any legislative authority without the king, such person shall incur all the penalties of a *præmunire*.

CHAPTER XIV.

POWERS AND PRIVILEGES OF PARLIAMENT.

[1 Bla. Com. 160—168.]

THE power and jurisdiction of parliament, says sir Edward Coke, is so transcendant and absolute, that it cannot be confined, for either causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land: as was done in a variety of instances in the reigns of king Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, the several statutes for triennial and septennial parliaments, [and those for amending the representation of the people,

in the year 1832.] It can, in short, do every thing that is not naturally impossible to be done; and therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and as sir Matthew Hale observes, this being the highest and greatest power, over which none other can have jurisdiction in the kingdom, if by any means a mis-government should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament, that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 & 8 Will. III. c. 25, with regard to the house of commons; doubts having arisen, from some contrary adjudications, whether or not a minor was incapacitated from *sitting* in that house. It is also enacted by statutes, 30 Car. II. st. 2, and 1 Geo. I. c. 13,* that no member shall vote or sit in either house, till he hath, in the presence of the house taken the oaths of allegiance, supremacy, and abjuration.† [Instead of these oaths, Roman Catholic members now take that prescribed by statute 10 Geo. IV. c. 7, § 2.—It is enacted by statute 7 & 8 Vict. c. 66, § 6, that no alien, though naturalised under that act by the certificate of a secretary of state, shall

* The disabilities imposed by this act, and a subsequent one of 6 Geo. III. c. 53, were repealed by statute 15 & 16 Vict. c. 43.

† Ante, p. 56.

be capable of becoming a member of either house of parliament, or of the privy council. Jews cannot sit in either house of parliament, unless they take the oath of abjuration (6 Geo. III, c. 53), containing the words, "*upon the true faith of a Christian*," which are part of the oath itself, and not merely of the ceremony for administering it.] * And there are not only these standing incapacities; but, if any person be made a peer by the queen, or elected to serve in the house of commons by the people, yet may the respective houses, upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member; and this by the law and custom of parliament.

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*. The whole of this law and custom of parliament, has its original from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case.† But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

The PRIVILEGES of parliament are likewise very large and indefinite. And therefore, when in 31 Henry VI. the

* *Miller v. Salomons*, 8 Exch. Rep. 778.

† Nor will the courts of law interfere with the province of either house of parliament by examining the merits of either case. See 3 Steph. Comm. 332.

house of lords propounded a question to the judges concerning them, the chief justice, sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question; for it hath not been used aforetime, that the justices should in anywise determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege, belongs to the lords of parliament, and not to the justices." [The jurisdiction of courts of law, in matters of parliamentary privilege, is one of the most embarrassing questions of constitutional law; and on a recent occasion (1837—1840) the respective jurisdictions were brought into serious conflict. To such a height were matters carried in the case of *Stockdale* v. *Hansard*, that the sheriffs of Middlesex were imprisoned by the house of commons for obeying the writ of the court of queen's bench! which issued an attachment against them for not doing so! An act of parliament was afterwards passed, (3 & 4 Vict. c. 9), which removed all ground for disputing the authority of parliament, but has, by an express proviso, left the general question of privilege and jurisdiction in a most unsatisfactory state. It must suffice to say, in the language of Mr. Justice Coleridge, in *Howard* v. *Gossett*, that "the law is supreme over the house of commons and over the crown itself." The case of *Stockdale* v. *Hansard*, 9 Ad. & Ell. 1, may be considered a mine of constitutional law.] Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof

to harass any refractory member, and violate the freedom of parliament. The dignity and independence of the two houses are, therefore, in great measure preserved, by keeping their privileges indefinite. Some however of the more notorious privileges of the members of either house are, privilege of speech, and of person. As to the former, privilege of speech, it is declared by the statute 1 W. & M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." [This refers, however, exclusively, to what is uttered as a member, in his place in parliament. If he choose to do so verbally, elsewhere, or afterwards write or print it, and it be of a slanderous or libellous nature, he is liable to an action or indictment, like any private person.] And this freedom of speech is particularly demanded of the queen, in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise are the other privileges, which included, formerly, not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either house, is a high contempt of parliament. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law, in matters of civil right, are now at an end, save only as to the freedom of the member's person; which in a peer, by the privilege of peerage, is for ever sacred and inviolable; and in a commoner, by the privilege of parliament, for forty days after every prorogation, and forty days before the next appointed meeting: which is now, in effect, as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. [The same privilege exists, to the same extent, in the case of a

dissolution.*] As to all other privileges, which obstruct the ordinary course of justice, they are totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by any pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment. [If a member of parliament become bankrupt, he may be dealt with in like manner as any other trader; but cannot be arrested or imprisoned during the period of privilege, except he commit a felony or misdemeanor, specified in the existing bankrupt act (1849).]

The claim of privilege has been usually guarded with an exception as to the case of indictable crimes; or as it has been frequently expressed, of treason, felony, and breach, or surety, of the peace. Whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any crime whatsoever. and instances have not been wanting, wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of parliament. To which may be added, that a few years ago, the case of writing and publishing seditious libels † was resolved by both houses, not to be entitled to privilege; and that the reasons upon which that case proceeded, extended equally to every indictable offence. So that the chief, if not the only privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained.

The laws and customs relating to the house of lords in

* *Goudy* v. *Duncombe*, 1 Excheq. Rep. 430.
† This is an allusion to the case of John Wilkes.

particular, will take up but little of our time. They have a right to be, and constantly are attended, by the judges of the superior courts of common law; as likewise by the king's learned counsel, being serjeants, and the attorney and solicitor general; for their advice in point of law. [The opinion of the judges, alone, however, on questions of law, is now desired by the house of lords: but it is not in any way bound to adopt such opinions, however decisive, or though unanimous. This assistance, a valuable part of the ancient constitution of the *consilium regis*, has never been withdrawn from the lords. Those above referred to are still summoned to attend, by writs from the crown, and places are assigned them on the woolsack.]

Another privilege is, that every peer, by licence obtained from the queen, may make another lord of parliament his PROXY, to vote for him in his absence; a privilege, which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his PROTEST.

All bills likewise, that may, in their consequences, in any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons, [which however may reject such bills altogether. And on the other hand, the commons will not tolerate the least alteration by the lords in a money bill: but they may reject it altogether.]*

* See the next chapter.

CHAPTER XV.

HOUSE OF COMMONS, AND ITS PROCEEDINGS.

[1 Bla. Com. 168—181.]

The laws and customs peculiar to the house of commons, relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies, or parliamentary aids, do begin in their house, and are first bestowed by them; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore, the commons not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this: The lords being a permanent hereditary

body, created at pleasure by the sovereign, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants.

Next, with regard to the election of knights, citizens, and burgesses; we may observe, that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty, but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in such a situation as that they are esteemed to have no will of their own.* If

* The different kinds of incapacity to vote in the election of a member of Parliament, may be reduced to three classes: those founded on want of intelligence, of integrity, and independence. See Warren's "Manual of Parliamentary Election Law," vol. i., chap. iii., p. 140.

these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications, whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle with us, than either of the methods of voting, by centuries, or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandise the patricians, or rich nobles; and those by the latter, had too much of a levelling principle. Our constitution steers between the two extremes. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution; not that I assert that it is in fact quite so perfect as I have here endeavoured to describe it; for, if any alteration might be

wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people. [The liberal spirit in which this is conceived, warrants us in the belief, that the distinguished commentator would have viewed with favour some of the leading features of the great extension and relaxation of our representative system, effected in the year 1832. In introducing the first of the great measures, having that object in view, one of the highest ministers of the day stated that "it must influence the character of the legislature, and the government, in all future time, and impress its influence on the whole frame of society;" while another declared it "the most important since the accession of the House of Brunswick to the throne of these realms." The declared object of the promoters of this great change was, as we have seen,* to found the measure on the ancient constitution of the country; to consider what were the defects in the representation of the people in the commons house of parliament; and amend those defects in the spirit in which the constitution was originally framed, and in unison with various other parts of our ancient, free, and glorious constitution. It was held essential that those who had the franchise, should be possessed of independence and intelligence; for if there be no independence, there is no expression of the public will, and that cannot be obtained which is the object of representation, the good government of the country.

[It must suffice to indicate briefly and generally, the scope of the vast changes of 1832. The elective franchise was in some respects restricted, and in many others greatly enlarged. In counties, the only franchise then existing, was the freehold one, in fee, and for life. This was retained, with superadded conditions and limitations respecting value, occupation, and possession for a specified length of time. To the freehold voters, however, were added *Copyholders* of

* Ante, p. 41.

all kinds; *leaseholders*, sub-lessees, and assignees; and *occupying tenants* at a yearly rental of £50. In boroughs, the ancient household franchise, and other corporation rights of voters, were retained, some for a time, and a few others in perpetuity. But the grand distinguishing feature of the whole scheme, was the introduction of what is called the ten pound franchise; that is, the occupation of a house and premises of the annual value of ten pounds, for twelve months, with conditions as to residence and rating, aimed at securing an adequate degree of respectability and responsibility; while the receipt of parish relief within a year, was to disentitle all borough electors to the franchise, for the time being. Thus much for the alteration in the franchise, which undoubtedly tended greatly to strengthen the democratic element in the constitution. In addition to this, 56 boroughs in England were wholly, and 30 partially disfranchised; while 42 new boroughs were created, returning respectively two, and one member. Several counties were divided into electoral districts, by which the number of members was increased, and other important changes of a kindred nature introduced. Corresponding changes were made during the same year in Scotland and Ireland; and the existing state of the representation is as follows:—*England and Wales* have together 159 county and 337 borough representatives; *Scotland* 30 of the former, and 23 of the latter; *Ireland* 64 of the former, and 41 of the latter; making, for the United Kingdom, (after deducting four, on account of the disfranchisement of the boroughs of Sudbury and St. Alban's, for bribery), 654 members of the commons' house of parliament. The test of disfranchisement, was declared to be, the number of the houses, and the assessments to the assessed taxes; and the basis on which it was proposed to proceed was, the smallness of the boroughs, on the ground that many of them were places without any inhabitants at all, while in others they were very few. A large and wide disfranchisement was proposed,

because such boroughs did not, and could not, represent the opinions of the inhabitants; while there were many great towns, and places of manufacturing industry, which could not otherwise be represented, without greatly increasing the number of members in the house, which was declared inexpedient.

[There was, however, another great change introduced at the same time, which was unexceptionably admirable—the system of REGISTRATION: destroying the source of monstrous expenditure and delay at elections, as well as difficulty, in ascertaining the right to vote, in all the hurry and turmoil of a keenly contested election. The right to stand on the electoral roll, is now ascertained with calmness and precision, at stated periods annually, wholly irrespective of an election, by judicial officers, called revising barristers, assisted by all the county and parish functionaries, and any witnesses, capable of giving authentic information to the court, as to the real right of each claimant to be entered on the register. Thus, when the day of election arrives, the right to vote is instantly and conclusively ascertained, by reference to printed copies of the register lying before the returning officer. Other excellent arrangements have also been made, as will be hereafter briefly indicated, for facilitating the exercise of the franchise, and simplifying the duties of the tribunals (committees of the house of commons) which ultimately adjudicate upon contested elections.*]

2. Next, as to the qualifications of persons to be elected members of the house of commons. Some of these depend upon the law and custom of parliament, declared by the house of commons; others upon certain statutes. And from these it appears, 1. That they must not be, as we have seen, aliens born, or minors. 2. That they must not be any of the judges [of either England, Scotland, or Ireland,

* All these matters may be seen explained at large, both practically and popularly, in Warren's "Manual of Parliamentary Election Law," in the earlier chapters of the first volume.

with the exception of the master of the rolls, which seems an anomaly]; 3. nor of the clergy, [the clergy of England, Scotland, and Ireland, are expressly excluded by statute 41, Geo. III. c. 63, which was occasioned by the case of the celebrated John Horne Tooke. The Roman Catholic clergy are excluded by statute 10, Geo. IV. c. 7, § 9]; 4. nor persons attainted of treason or felony, [nor outlawed on criminal prosecution], for they are unfit to sit anywhere. 5. That sheriffs of counties, and mayors, recorders, and bailiffs of boroughs, are not eligible in their respective jurisdictions; but the sheriffs of one county, are eligible to be knights of another. [6. Commissioners, and other officers connected with the revenue, especially of customs, excise, &c., are rendered ineligible by many statutes, as obviously under the influence of the crown. 7. Government contractors are also excluded for the same reason, under a very stringent and comprehensive statute, which imposes a penalty of £500 for every day during which the offender shall sit, or vote.] 8. So, also, are excluded persons that hold any new office under the crown, created since 1705. 9. No person having a pension under the crown, during pleasure, or for any term of years, is capable of being elected, or sitting. 10. If any member accept an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected. 11. Every knight of a shire shall have a clear estate of freehold or copyhold, to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds, except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities, and Trinity College, Dublin. [Now however, (statute 1 & 2 Vict., c. 48), both county and borough members for England and Ireland, may qualify in respect of either real, or personal estate, or in respect of both kinds combined, to the respective amounts specified in the

text; but the qualifying property must be in either Great Britain or Ireland.* The qualification is no longer required to be sworn to: the candidate must, at the time of the election, if duly required, sign a "declaration," of the nature of it, and his election will be avoided, if he wilfully neglect or refuse to do so; and again, he must deliver to the clerk of the house, a similar declaration, before sitting or voting, on peril of his election being avoided, and also of his being guilty of a misdemeanor, if the declaration be in any material particular, knowingly untrue. An Irish peer, if not elected a representative peer, can sit for any place in Great Britain.]

Subject to these standing restrictions and disqualifications, every subject of the realm is eligible, of common right.

3. The third point, regarding elections, is the method of proceeding therein.

As soon as the parliament is summoned, the lord chancellor, or if a vacancy happens during the sitting of parliament, the speaker, by order of the house—and without such order, if a vacancy happens by death, or the member's becoming a peer, in the time of prorogation or adjournment; —sends his warrant to the clerks of the crown in chancery [for Great Britain and Ireland respectively; who thereupon issue out writs, directed, by stat. 16 & 17 Vict. c. 68 § 1, in county elections in England and Wales, to the sheriff, who alone is to make the election; for the universities of Oxford and Cambridge, to the vice chancellors; and in boroughs, to the returning officers; all of whom are thereupon to proceed, in due course of law, to the election. In counties, the proclamation, by § 2, is to be made at a special county court holden for that purpose, not sooner than the sixth. nor later than the twelfth day of making such proclamation. In boroughs, the returning officer must proceed to the election within six days after the receipt of the writ, giving three

* No property qualification is required in the members for Scotland.

clear days' notice at least, of the day of election, exclusive of the day of publishing notice of such election, and of the day of election; and no poll shall be taken at any inn, hotel, tavern, public house, or beerhouse, or place directly communicating with either, without the written consent of all the candidates. Every returning officer for a county or borough, is now to make the proclamation, in counties, and give the notices of election, in boroughs, specified in the schedule to stat. 17 & 18 Vict. c. 102, in lieu of those formerly used: each instrument containing a warning against incurring the penalties attached to bribery, treating, and undue influence. The places for holding elections are regulated by very recent statutes, which also have appointed convenient districts for polling: and the days and even hours within which the proceedings must take place, are the subject of very precise enactment. Both county and borough elections are now limited to one day's, and those for Oxford and Cambridge to five days' polling. The returning officer has, for his guidance, copies of the printed register, which are conclusive as to the right of voting:—but the voter may, before polling, be required to swear to his identity, and that he has not already voted. Strict provisions exist to prevent personation of voters, and to meet the case of a riot, by adjourning the poll; and the bribery oath may be administered, if duly demanded.]

And, as it is essential to the very being of parliament, that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. [No soldier within two miles is allowed to quit his quarters on the day of nomination or polling, expect to mount guard, or, if he happen to be a voter, to record his vote: after doing which, he must instantly return to his quarters, 10 & 11 Vict. c. 21.

[The undue influence of the crown, has been from time to time sedulously guarded against, by both statutes and resolutions of the house of commons; the former inflicting

heavy penalties, and the latter declaring it highly criminal for the functionaries, or executive ministers or servants under the crown, and peers or prelates, to use office or authority, directly or indirectly, or in any way to concern themselves in the election of members of the house of commons.]

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which they themselves co-operate, by the infamous practice of bribery and corruption. [The legislature has exerted its utmost energies, especially of late years, but ineffectually, to check these dangerous and demoralising courses. At length, in the year 1854, all existing statutes on the subject were repealed, and other provisions substituted, together with an entirely new mode of conducting elections, by an act entitled "*The Corrupt Practices and Prevention Act*, 1854."*. This statute defines, carefully and comprehensively, what constitutes "BRIBERY, TREATING, and UNDUE INFLUENCE;" imposes serious penalties; totally prohibits acts formerly found to be modes of exercising corrupt influence; and strictly limits legitimate expenses, requiring them to be paid only through an officer called the Election Auditor, whose accounts are to be published; and finally disables a candidate, declared by an election committee guilty by himself, or his agents, of bribery, treating, or undue influence, from being elected or sitting in the house of commons, for the place where the offence was committed, during the parliament then in existence.] To complete the efficacy of [this statute] there is nothing wanting but resolution and integrity to put it in strict execution. [It might, however, be well if the candidate were required to make a sworn statement, or upon his honour, *before* an election, that he would not directly or

* This act was passed on 10th August, 1854.

indirectly at any time do, sanction, or recognise any of the prohibited corrupt practices; and, after an election, that he had not. This has been several times proposed in parliament, but ineffectually.]

The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority; and the sheriff returns the whole, together with the writ for the county, and the knights elected thereupon, [and the poll books] to the clerk of the crown in chancery. The members thus returned by him, are the sitting members, until the house of commons, to whom alone belongs the power of determining contested elections, upon petition, shall have adjudged the return to be false and illegal. The form and manner of proceeding upon such petition, [were, since the year 1770, regulated by statute 10 Geo. III. c. 16. called the Grenville Act, which established something like a fitting tribunal for the adjudication of election petitions. After having been repeatedly varied in its machinery, in the year 1848 was established the new and greatly improved system now in force, by the statute entitled "The Election Petitions Act, 1848," Stat. 11 & 12 Vic. c. 98.* Almost every conceivable precaution is there taken, to secure an impartial committee; which consists of only five sworn members, whose rights and duties are defined with punctilious exactness. There are, however, many who approve of transferring the decision in such matters, to an independent tribunal; but the house of commons will not easily part with so large a share of its rights and authorities. It remains to be added, that as the State has a right to the services of its members, a person may be elected a member of the house of commons, without his knowledge, and even against his wish; and he will be compelled to serve. He cannot resign his seat, except indirectly, by doing some

* See it fully and popularly explained in Warren's "Parliamentary Election Law," vol. i. c. 14.

act which vacates it, as by accepting an office of nominal profit under the crown; that usually selected being called "the Stewardship of the Chiltern hundreds." It is ordinarily granted by the government, but by no means as a matter of course: and it was refused by the chancellor of the exchequer in the session 1842-3.]

CHAPTER XVI.

ROUTINE OF BUSINESS IN PARLIAMENT.

[1 Bla. Com. 181—189.]

I. THE method of making laws is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for despatch of business, each house of parliament has its speaker. The speaker of the house of lords, whose office is to preside there, and manage the formality of the business, is the lord chancellor, or keeper of the queen's great seal, or any other person [not necessarily a peer]* appointed by the queen's commission: and, if none be so appointed, the house of lords, it is said, may elect. The speaker of the house of commons is chosen by the house; but must be approved by the queen. And the usage of the two houses differs, in this,—that the speaker of the house of commons cannot give his opinion, or argue any question, in the house [except when it has resolved itself into a committee of the whole house]; but the speaker of the house of lords, if a lord of parliament, may. [The speaker of the house of commons votes only when the numbers are equal, and then, like any

* Lord Brougham, on the 22nd November, 1830, sate on the woolsack as lord chancellor, before his patent of peerage had been made out; and lord St. Leonards on the 4th March, 1852, before he had been introduced as a peer. The woolsack is not, in fact, within the house.

other member, according to his conscience: but it is usual for him, when practicable, to give his vote in such a way as to afford the house another opportunity of considering the question.]* In each house, the act of the majority binds the whole; and this majority is declared by votes openly and publicly given; not as at Venice and many other senatorial assemblies, privately, or by ballot. This latter method may be serviceable to prevent intrigues and unconstitutional combinations; but it is impossible to be practised with us, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

It may be stated generally, that the mode of introducing and passing bills, is almost the same in each house of parliament, and bills may originate in either house; but the exclusive right of the commons to grant supplies, and impose pecuniary charges on the people, accounts for the vastly greater proportion of bills being originated, occasioning serious public inconvenience, in their house.—A bill, however, affecting the privileges of either house, is introduced in that to which it relates.

[Bills are either public, or private. The former, is one of public policy, affecting the entire community; the latter, for the particular interest or benefit of any individual, or public company, corporation, parish, city, county, or other locality; nay, a bill for the benefit of three counties, has been held a private bill. † To private bills are applicable numerous special provisions.—In the house of lords, any peer may present and lay a bill on the table; but in the house of commons, a member must first obtain permission from the house.

[Certain bills must originate in a committee of the whole

* This right was exercised on this principle, on the 6th May, 1851. See the Journals.

† 1 Commons Journal, 388.

house: viz., any bill relating to RELIGION, or TRADE, or the alteration of the laws concerning either, or for granting any money, or releasing or compounding any money owing to the crown. The rule relating to religion, is construed as applicable to its spiritual relations—its doctrines, profession, or observance, not the temporalities or government of the church, or other legal incidents of religion; but the distinction is often very difficult to draw. The rule relating to trade, applies as well to trade generally, as to any particular trade affected by the bill.]

To bring in a BILL, if the relief sought by it is of a private nature, it is first necessary to prefer a PETITION; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition, when founded on facts that may be in their nature disputed, is referred to a committee of members, who examine the matter alleged, and accordingly report to the house; and then, or otherwise upon the mere petition, leave is given to bring in a bill. In public matters the bill is brought in upon motion made to the house, without any petition at all; [but there are many *Standing Orders* relative to both classes of bills, which must be strictly complied with, or a compliance specially dispensed with.] Formerly, all bills were drawn in the form of petitions,* which were entered upon the parliament rolls, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case might require: and at the end of each parliament, the judges drew them into the form of a statute, which was entered on the statute rolls. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges, before the end of the parliament; and in the reign of Henry VI., bills in the form of acts, according to the modern custom, were first introduced. [The enacting style of every bill, as we have

* Many of these petitions commenced thus, "your poor commons beg and pray," and conclude "for God's sake, and as an act of charity!"

already seen, is as follows, and it is now to be used but once, and at the commencement of each (stat. 13 & 14 Vict., c. 21.) :—" Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same." To a student of constitutional law, these words are pregnant with significance.

[A bill is now presented to the house, printed on paper, and care must be taken that it correspond with the leave granted to bring it in, or the house may order it to be withdrawn. All dates, amounts of salaries, tolls, rates, or other charges and matters, were formerly left in blank, but are now printed in italics, being, however, no part of the bill till agreed to by the committee. The member presenting a bill, must go from his place, to the bar of the house, when the speaker calls on him, by name. He answers "A bill, sir." The speaker desires him to "bring it up," on which he takes it to the clerk of the house, who reads the title aloud—when it is said to have been "received by the house." The question is then put, "That this bill be *now* read a first time," which in the commons can be opposed by a division only,—a course equally rare, in both houses. If, however, it should be negatived, the attempt may be repeated on a future day, on notice and motion. The bill is not actually *read* at length, a course rendered unnecessary by the circulation of printed copies, with an analysis of the various clauses, among all the members of the house. The next question put is "that the bill be read a second time," which takes place on some future day. It then stands in the order book, and is called on in its proper turn. That is the most critical stage of the bill; when its whole principle is at issue, and affirmed or denied by the house. The ordinary course for an opponent is, to move an amendment, by leaving out the word "*now*," and substituting "that day six months," or any other term beyond the probable duration of the session: a courteous

mode of dismissing the bill from further consideration. If this be not done, the bill is read a third time, and passed.] In the house of lords, when the bill begins there, it is, when of a private nature, referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading, the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any further? If the opposition succeed, at any stage, the bill must be dropped for that session.

After the second reading, it is "committed," that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a COMMITTEE OF THE WHOLE HOUSE. A committee of the whole house, is composed of every member; and, to form it, [in the lords, the chancellor leaves the woolsack, and a lord (the chairman of committees), presides in his stead—not however, on the woolsack, but at the table where the clerks sit. In the commons] the speaker quits the chair, another member, [usually the chairman of the committee of ways and means] being appointed chairman, and then the speaker may sit and debate as a private member,* [and may vote if he please; but the right is rarely exercised.] In these committees, the bill is debated clause by clause, amendments are made, the blanks filled up, and sometimes the bill is entirely new modelled. After it has gone through the committee, the chairman reports it to the house, with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the "question"

* The chief difference between the proceedings of a committee of the whole house, and those of the house itself, is that in the former a member may speak more than once, in order that the measure under consideration may have the most minute examination.

is repeatedly put, upon every clause, and amendment. When the house has agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill was formerly ordered to be [engrossed]: but in the year 1849,* that practice was discontinued, and the bill ordered to be reprinted, if several amendments have been made]. The speaker then again opens the contents; and, holding up the bill in his hands, puts the question, whether the bill shall pass? If this be agreed to, the title to it is then settled; which used to be a general one, for all the acts passed in the session, till, in the first year of Henry VIII. distinct titles were introduced for each chapter. After this, the bill is [reprinted], and one of the members—usually he who has charge of the bill, is directed to carry it to the lords, and desire their concurrence. Attended by not fewer than four more, the member carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other house; and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. If, however, it be agreed to, the lords send a message by, at present, two masters in chancery, or [if the bill concern the crown or royal family,] by two of the judges, that they have agreed to the same: and the bill remains with the lords, if they have made no amendment to it. But, if any amendments have been made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference † usually follows between members deputed from each house; who for the most part settle and adjust

* May's Parl. Practice, 3rd edit. 382.

† In the year 1851, both houses agreed to receive *messages* on such occasions, instead of having conferences, unless either house should desire a conference.

the difference; but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords, by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But when an act of grace, or pardon is passed, it is first signed by her majesty, and then read once only, in each of the houses. And when both houses have done with any bill, it is always deposited in the house of peers, to wait the royal assent, [which in the language of Lord Hale, gives it "the complement and perfection of a law"], except in the case of a bill of supply; which, after receiving the concurrence of the lords, is sent back to the house of commons.

The Royal Assent may be given in two ways: 1. In Person; when the queen comes to the house of peers, in her crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read. The queen's answer is declared, by the clerk of the parliament, in Norman-French; a badge, it must be owned, now the only one remaining, of conquest; and which one could wish to see fall into total oblivion; unless it be reserved as a solemn memento, to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the queen consent to a public bill, the clerk usually declares, "*la reyne le veut*—the queen wills it so to be;" if to a private bill, "*soit fait comme il est desiré*—be it as it is desired." [When the queen gives her assent in person, the clerk of the crown reads the titles, and the clerk assistant of the parliaments makes an obeisance to the throne: Her majesty giving a gentle inclination, indicative of assent, and then uttering the words above mentioned.] If the queen refuse her assent, it is in the gentle language of "*la reyne s'avisera*—the queen will advise upon it." [The queen, however, is spared so painful and ungracious an act, by the strict

observance of the constitutional principle, that the crown has no will but that of its ministers, who continue such only so long as they enjoy the confidence of parliament.*] When a bill of supply [or money-bill] is passed, it is carried up and presented to the queen, by the speaker of the house of commons; and the royal assent, given to it before all other bills, is thus expressed: "*la reyne remercie ses loyal subjects, accepte leur benevolence, et ainsi le veut*,—the queen thanks her royal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament used thus to pronounce the gratitude of the subject; "*les prelats, seigneurs, et commons, en ce present parliament assemblées, au nom de touts vous autres subjects, remercient tres humblement votre majesté, et prient a Dieu vous donner en sante bone vie et longue;* the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live." [But according to modern usage, the royal assent is signified in the same way as to a public bill.] 2. By Commission. By the statute 33 Henry VIII. c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. [The form of signifying the royal assent, by commission, is this. Three or more of the lords commissioners, seated, robed, and covered, on a form, between the throne and the woolsack, command the usher of the black rod to summon the commons to hear the commission read; on which, with the speaker, they appear at the bar, when the commission is read at length.] When the bill has received the royal assent, in either of these ways, it is then, and not before, a STATUTE, or Act of Parliament.

* The power in question was last exercised in 1707, by Queen Anne.

[Since the year 1849, the authenticated vellum print of] a statute, or act, is placed among the records of the kingdom; there needing no formal promulgation to give it the force of law, as was necessary with the civil law, with regard to the emperor's edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. [Copies of the act are printed by the queen's printer; and by statute 8 & 9 Vict., c. 113, §§ 3, 4, the mere production, in a court of justice, of such a printed copy, is sufficient evidence that it is the act of the legislature, if it purport to be printed by the queen's printer. The original rolls, or prints, moreover, may also be seen, and copies taken, on payment of the specified fees.] Before the invention of printing, a statute was published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos, in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari, faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would, might read or take copies thereof; which custom continued till the reign of Henry VII. [The clerk, or clerk assistant, of parliament endorses on every act, the day, month, and year, when the act received the royal assent; which indorsement is declared, by statute, to be part of the act, and the date of its commencement, provided the act itself do not, as it usually does, fix the period of its commencement.]

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It has power to bind every subject in the land, and the dominions thereunto belonging; nay, even the queen herself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but with the same forms, and by the same authority, of

parliament; for it is a maxim in law, that *it requires the same strength to dissolve, as to create an obligation.* It is true, it was formerly held that the king might in many cases dispense with penal statutes; but now, by statute 1 W. & M. st. 2, c. 2, it is declared, that the suspending, or dispensing with laws by regal authority, without consent of parliament, is illegal.

II.—There remains to be briefly noticed only the manner in which parliaments may be Adjourned, Prorogued, or Dissolved.

An ADJOURNMENT is no more than a continuance of the session from one *day* to another, as the word itself signifies: and this is done [solely] by the authority of each house, separately, every day; and sometimes for a fortnight or month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house, is no adjournment of the other. It has also been not unusual, when the sovereign signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly. [Though no instance has occurred in which either House has refused to adjourn, the royal message might, nevertheless, possibly be disregarded. Business has often been transacted after the receipt of such message, and the adjournment afterwards put, in the ordinary way, as if no such intimation had been received. Such an interference on the part of the crown, may be regarded as both needless and impolitic. The crown, however, has power *by statute* (39 & 40 Geo. III. c. 14) to interfere with an adjournment in the case there specified. If parliament were to think proper to disregard the royal intimation] besides the indecorum of a refusal, a prorogation would assuredly follow, which would often be very inconvenient to both public and private business. For prorogation puts an end to the session;

and then such bills as are only begun, and not perfected, must be resumed *de novo*, if at all, in a subsequent session:* whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on, without any fresh commencement.

A PROROGATION is the continuance of the parliament from one *session* to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed by either the lord chancellor in her majesty's presence, or by commission from the crown, or, frequently, by proclamation. Both houses are necessarily prorogued at the same time; it being a prorogation not of the house of lords, or commons, but of the parliament. And while the parliament is separated by adjournment, or prorogation, the queen is empowered to call it together by proclamation, with fourteen days' notice of the time appointed for its re-assembling. †

A DISSOLUTION is the civil death of the parliament, and may be effected in three ways: 1. By *the queen's will*, expressed either in person, or by representation. For, as the queen has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that she may, whenever she pleases, prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate king Charles the First; who, having unadvisedly passed an act to continue the parliament then in being, till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate

* An Election Committee is not dissolved by a prorogation, but adjourned to the day immediately following that of the next meeting of Parliament. Stat. 11 & 12 Vict., c. 98, s. 88.

† 37 Geo. III., c. 127; and 39 & 40 Geo. III., c. 14.

power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the despatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

2. A parliament may be dissolved by *the demise of the crown:* [that being the only contingency on which parliament is required to meet, without summons in the usual form.] This dissolution formerly happened immediately upon the death of the reigning sovereign: for he, being considered in law as the head of the parliament,—*caput, principium, et finis,*—that failing, the whole body was held to be extinct. But, the calling a new parliament, immediately on the inauguration of the successor, being found inconvenient, and dangers being apprehended from having no parliament in being, in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III. c. 15, and 6 Ann, c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor; that, if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately: [in pursuance of which enactment parliament has several times met on a Sunday*] and [by stat. 37 Geo. III. c. 127,] if no parliament is then in being, the members of the last parliament shall assemble and be again a parliament.

3. Lastly, a parliament may be dissolved, or expire, *by length of time.* For if either the legislative body were perpetual; or might last for the life of the prince who

* See several instances enumerated in Mr. May's valuable Parl. Pract. p. 41, note (3), 3rd edit.

convened it, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives;—in these cases, if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others, will think themselves bound in interest, as well as duty, to make only such laws as are good. [They are, besides, restrained by a sense of responsibility for all their doings, to the nation at large which had elected them, and before which they may wish to present themselves for re-election.] The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2, was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2, c. 38, [commonly known as the *septennial act*] in order, professedly, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion, this term was prolonged to seven years: and, which alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every SEVENTH year; if not sooner dissolved by the royal prerogative. [When it was proposed, in the year 1832, to shorten the duration of parliament, Lord John Russell observed, that while it was desirable that the constituency should have a proper control over their representatives, it was, at the same time, most inexpedient to make the duration of

parliament so short, that the members of the house of commons should be kept in a perpetual canvass, and not able to consider and decide with freedom any great question. "I do not think," said the noble lord, "it behoves the people of a great empire, to place their representatives in such dependence." *]

* Hansard, vol. II. (3rd ser.) col. 1084.

CHAPTER XVII.

DOCTRINE OF THE HEREDITARY RIGHT TO THE BRITISH THRONE.

[1 Bla. Com., 190—197.]

THE supreme executive power of these kingdoms, is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power [as is solemnly declared by stat. 1 Mary, stat. 3, c. 1].

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent, is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent, in order to mark out with precision, who is THAT SINGLE PERSON, to whom are committed, in subserviency to the law of the land, the care and protection of the community; and, to whom, in return, the duty and allegiance of every individual are due.* It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear

* See post, "the queen's duties."

and indisputable; and our constitution has not left us in the dark upon this material occasion.

The grand fundamental maxim upon which the right of succession to these kingdoms depends, I take to be this: THAT THE CROWN IS, BY COMMON LAW AND CONSTITUTIONAL CUSTOM, HEREDITARY; AND THIS, IN A MANNER PECULIAR TO ITSELF: BUT THAT THE RIGHT OF INHERITANCE MAY FROM TIME TO TIME BE CHANGED OR LIMITED BY ACT OF PARLIAMENT, UNDER WHICH LIMITATIONS THE CROWN STILL CONTINUES HEREDITARY.

1. First, it is in general *hereditary*, or *descendible to the next heir, on the death or demise of the last proprietor*. All regal governments must be either hereditary, or elective: and, as I believe there is no instance where the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I., it must of consequence be hereditary. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. They might perhaps have made it, if they had thought proper, an elective monarchy; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent, and refined, by degrees, into common law; the very same title which every private man has to his own estate.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and acccordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, has usually been elective. And, if the individuals who compose that state, could always continue true to its first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a

kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown which his endowments have merited; and the sense of an unbiassed majority, would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind, in the present state of human nature, are too frequently brought about by influence, partiality, and artifice: and even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful majority, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has, by becoming such, virtually engaged to submit. Whereas, in the great and independent society which every nation composes, there is no superior to resort to, but the law of nature; no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations complaining of mutual injuries, the quarrel can be decided only by the law of arms; so, in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to have been unduly made, the only tribunal to which the complainants can appeal, is that of the God of battles; the only process by which the appeal can be carried on, is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the

experience of modern times, may show us, are the consequences of elective kingdoms.

2. But, secondly, as to the *particular mode of inheritance: it in general corresponds with the feudal path of descents, chalked out by the common law, in the succession to landed estates; yet with one or two material exceptions.*

[In order, however, to understand this and the ensuing chapter, it is necessary to be acquainted with the nature of lineal and collateral descent. "*Lineal*" consanguinity, is that which subsists between persons of whom one is descended in a direct "*line*" from the other: as between son and father, grandfather, great grandfather, and so upwards, in the direct ascending line; or between father and son, grandson, great grandson, and so downwards, in the direct descending line. *Collateral* consanguinity, signifies the relation subsisting between those who descend from the same stock, or ancestors, but not *from one another*. ADAM, for instance, had two sons, CAIN and ABEL; the children of Cain were related to the children of Abel, as collateral kinsmen, or cousins; because they all lineally descended as it were, *side by side*, from their common ancestor Adam, and all had a portion of his blood in their veins, which makes them "*consanguineos*."] Like estates, the crown will descend lineally to the issue of the reigning monarch: as it did from king John to Richard II., through a regular pedigree of six lineal generations. (2.) As in common descents, the *preference of males to females*, and the right of primogeniture among the males, are strictly adhered to. Thus, Edward V. succeeded to the crown, in preference to Richard, his younger brother, and Elizabeth, his elder sister. (3.) Like lands or tenements, the crown, *on failure of the male line, descends to the issue female*; thus, Mary I. succeeded Edward VI.; and the line of Margaret queen of Scots, the daughter of Henry VII., succeeded, on failure of the line of Henry VIII., his son. (4.) But, among the females, the crown descends, *by right of primogeniture, to the*

eldest daughter only, and her issue; and not, as in common inheritances, to all the daughters at once: the evident necessity of a sole succession to the throne, having occasioned the royal law of descents to depart from the common law in this respect: and therefore queen Mary, on the death of her brother, succeeded to the crown alone, and not in partnership with her sister Elizabeth. (5.) Again: *the doctrine of representation prevails in the descent of the crown,* as it does in other inheritances; by representation being meant, that the lineal descendants of any person deceased, stand in the same place as their ancestor, if living would have done, and so, "represent" him. Thus, Richard II. succeeded his grandfather Edward III., in right of his father the Black Prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late occupant of the throne, provided they are lineally descended from the blood royal; that is, from that royal stock which originally acquired the crown. Thus, Henry I. succeeded to William II.. John to Richard I., and James I. to Elizabeth; being all derived from the Conqueror, who was then the only regal stock. But herein there never was any objection as there [was, till of late,] in the case of ordinary descents, to the succession of a brother, an uncle, or other collateral relation, of the half blood: * that is, where the relationship proceeds not from the same couple of ancestors, which constitutes a kinsman of the whole blood, but from a single ancestor only; as when two persons are derived

[* A kinsman of the whole blood, is one derived from not only the same ancestor, but the same pair of ancestors. Thus, if a man have two sons, John and James, by the same wife, they are brothers of the whole blood; but if his wife had died after bearing John, and the father had married again, and by his second wife had a son, James, then they are brethren of the half-blood only; and if John died, his cousin, though ever so distant, would succeed, to the exclusion of James. This ancient and harsh rule, almost peculiar to our laws, was abrogated in the year 1833, by statute 3 & 4 Wm. IV. c. 106. § 9.]

from the same father, and not from the same mother, or *vice versâ:* provided only that the one ancestor from whom both are descended, be that from whose veins the blood-royal is communicated to each. Thus, Mary I. inherited to Edward VI., and Elizabeth to Mary; all children of the same father, king Henry VIII., but all by different mothers. [It is not, however, easy to decide whether Mary and Elizabeth took the crown by inheritance, or special parliamentary limitation. Both of them had been declared, by statute, illegitimate, and incapable of inheriting the crown; but a subsequent act, without repealing the former, limited the succession to them, under specified circumstances and conditions. On considering the acts passed by each, at her succession, it would seem, that though neither chose to rely on the parliamentary limitation alone, neither deemed it prudent to discard its security.]*

3. *The doctrine of* HEREDITARY *right, does by no means imply an* INDEFEASIBLE, *right to the throne.* No man will, I think, assert this, who has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the queen and both houses of parliament, to defeat this hereditary right, and by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and *successors.*" In which we may observe, that, as the word "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person: so, the word "successors," distinctly taken, must imply that this inheritance may sometimes be broken through; or that there may be a successor, without being the heir of the

* See Mr. Justice Coleridge's note to 1 Black. Comm. 195.

king. And this is so extremely reasonable, that without such a power lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case as that the heir apparent should be, or by the visitation of God became, incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere; and yet, the inheritance and regal dignity would be precarious indeed, if this power were expressly and avowedly lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently, it can nowhere be so properly lodged, as in the two houses of parliament, by and with the consent of the reigning sovereign, who, it is not to be supposed, will agree to anything improperly prejudicial to the rights of his own descendants. And therefore, in the queen, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly; *however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it.* And hence, in our law, the king is said never to die, in his *political* capacity; though, in common with other men, he is subject to mortality in his *natural;* because immediately upon the natural death of Henry, William, or Edward, the king survives, in his successor. For the right of the crown vests, *eo instanti*, in his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*:* but, as sir Matthew Hale observes, the right of sovereignty is fully invested in the successor, by the very descent of the crown.† And therefore,

* See the concluding paragraph in this chapter, enclosed in brackets.

† Upon this principle, the statutes passed in the first year of the restoration, are always called "the acts in the twelfth year of the reign of Charles I."; and all the legal proceedings of that reign, are dated from the

however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it be otherwise ordered and determined. In the same manner landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law; but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

In *these four points, consists the constitutional notion of hereditary right to the throne:* which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. And in the pursuit of this inquiry, we shall find, that, from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above-mentioned have ever been held the constitutional canons of succession.* It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally, at last, returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary, in the wearer of it; of which the usurpers themselves were

year of the death of Charles I. (1648—9), and not from 1660, when Charles II. was restored.

* See the concluding paragraph of this section, in brackets, and the corresponding one prefixed to the next.

so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase, or acquisition, of a new estate of inheritance, and transmitted, or endeavoured to transmit it, to their own posterity, by a kind of hereditary right of usurpation.

[It is not strictly accurate to say, that at all periods of our history, it has been the constitutional canon that, as at present, in contemplation of law "the king never dies:" that on the instant of the predecessor's demise, his heir succeeded *de facto*, as well as *de jure*. This doctrine has been undoubtedly established for ages, and is beyond controversy; but the researches of modern constitutional writers appear to have established, that in ancient times, an interval usually, if not constantly, intervened between the death of a king, and the recognition of his successor. From the time of John to that of Edward VI., or, during upwards of three centuries, the several reigns did not commence until some public act of sovereignty, such as the proclamation of the king's peace * had been performed, or till he had been publicly recognized by his subjects; and in the cases of the first eight kings after the Conquest, their reigns did not commence until the solemnization of their coronation. These matters, however, will be noticed more fully, in the introductory section of the next chapter.]

* This first proclamation was considered to be in force during the remainder of the king's life, so as to bring within its penalties any disturber of the public tranquillity. So much importance was attached to this ceremonial that, even in the reign of king John, offences committed during the *interregnum* between the death of the last monarch and the recognition of his successor, were unpunishable in those tribunals which derived their authority from the crown. Palgrave, Rise and Prog. Engl. Commonwealth, p. 285.

CHAPTER XVIII.

HISTORY OF THE SUCCESSION OF THE BRITISH MONARCHS.

[1 Bla. Com. 198—218.]

[SANCTIONED by the practice of many centuries, it has become a fundamental and incontrovertible maxim of the constitutional law of England, that THE KING NEVER DIES. There is no such a thing as an *interregnum*; but by the death of the sovereign, the royal dignity instantly attaches to the successor. In ancient times, however, this was otherwise: for an interval, sometimes of several days, and even weeks, usually intervened between the death of the sovereign and the recognition of his successor, so as to justify the assertion, that though the crown may have been hereditary, the heir's right was not of so absolute a nature, as to depend solely on the demise of the royal ancestor. As far back as can be traced by evidence,—that is, from the time of king John,—the reign seems not to have begun until the coronation; and there appear weighty reasons for believing, that the reigns of William I., William II., Henry I., Stephen, Henry II., and Richard I., also commenced on the day of that ceremony.

[With the Saxons, the crown was elective. The king was usually chosen, it is true, by the Wittenagemote, from a particular family; but there seems to have been an absolute liberty

of choice, determined by favour, convenience, or accident, as to which member of that family should be selected. The son has been preferred to the father; the brother to the son; and in one case, that of Edward the elder, eldest surviving son of Alfred, whom he succeeded, the line of the younger brother prevailed over the descendants of the elder brother. Nor was illegitimacy an exclusion; for Edward the elder was succeeded by Athelstan, his natural son, whom the Wittenagemote elected, on the death of his father. Both Athelstan and Edmund Ironsides were illegitimate, and reigned while they had legitimate brothers living.

[It appears certain, that the accession of some of the early Norman kings was dated from the day of their coronation; from which it may follow that even then, the crown was, as in the time of the Saxons, at least in form, elective. Most of the contemporary chroniclers, in speaking of a new sovereign's accession, use the words "*in regem* ELECTUS," or "ELEVATUS;" and the coronation is spoken of in terms leaving it almost beyond doubt, that the ceremony rendered the individual, previously elected, the king *de facto*, and that till such ceremony had been celebrated, he was king only *de jure*. This custom continued, without interruption, till the accession of Edward I., who was in the Holy Land when his father Henry III. died, on the 16th of November, 1272; the former being proclaimed four days afterwards, on Sunday the 20th of November, 1272. Nearly three centuries afterwards, viz., on the 28th of January, 1547, Edward VI. ascended the throne on the day of his father's death; and the custom thenceforward became uniform, for each sovereign to date his accession to the crown, from the day of the demise of his predecessor.

[In a chronological point of view, the distinction here indicated is of real importance; for an error respecting the exact *day* from which the regnal year,—i.e., the year of the king's reign,—is calculated, may occasion *a mistake of one entire year*, in reducing that date to the year of the incarnation,

and such discrepancies may lead to fatal errors; while in history, effects may be confounded with causes, and inferences drawn from discoveries wholly imaginary. The mere knowledge that any circumstance did happen, observes that late distinguished antiquarian lawyer, Sir Harris Nicolas, is of little use for the legitimate purpose of history, the utility of which depends on tracing events to their causes; and when these are known, to discover their general consequences. A mistake in the date of the battle of Waterloo, might induce a writer, hereafter, to confound cause with effect, by supposing that Napoleon's second abdication preceded, instead of being the result of, his defeat in that battle.

[The student in constitutional law, must withhold his assent from the proposition of Carte and Blackstone, that the rule of the Anglo-Saxon monarchy was lineal agnatic* accession, the blood of the second son having no right, till the extinction of that of the elder.

[It remains, moreover, to be observed, that the Anglo-Saxon "king" differed widely from the "king" of modern times. The main distinction between him and the rest of the people, out of whom he was chosen, lay in the higher money value, "were-gild," or life-price, set upon his life; but the notion of territorial influence was never associated with it. He was king of his subjects, and not of the territory they inhabited. That the soil of England belongs to the king, was a feudal fiction: and even William the Conqueror, and the first two princes of the house of Plantagenet, used, on their great seal, the appellation, "Rex *Anglorum*." John was the first who engraved on it the title "Rex *Angliæ*," and in that he has been followed by all his successors, till the union with Ireland.†

[Thus much it has been deemed proper to premise, at the commencement of this chapter, in order that such assertions

* By agnatic succession is meant, issue derived from the male ancestor.
† Ante, p. 78.

as are to be found in it, viz.: that "it clearly appears that the crown of England hath *ever* been an hereditary crown," and in the preceding one, that "from the day of Egbert, even to the present, the four cardinal maxims constituting the notion of hereditary right have ever been held the constitutional canons of succession,"—may be received with at least great caution.* The crown of England, in truth, passed gradually from an elective, to an hereditary succession: a change highly auspicious to the national prosperity, by precluding the most destructive of all human competitions. It has been well observed by Dr. Paley, that "the confession of every writer on the subject of civil government, the experience of ages, the example of Poland, and of the papal dominions, seem to place the maxim '*that an hereditary monarchy is universally to be preferred to an elective monarchy*,' amongst the few indubitable maxims which the science of politics admits of."]

King Egbert, about the year 800, found himself in possession of the throne of the West Saxons, by a long and undisturbed descent from his ancestors, of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by conquest, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that *when one country is united to another, in such a manner, as that one keeps its government and status, and the other loses them,*

* Whoever wishes to prosecute these subjects further, is referred to Sir Harris Nicolas' "Chronology of History;" Allen, "On the Royal Prerogative;" Kemble's "Saxons in England;" Lappenburg's "England under the Anglo Saxon Kings;" Hallam's "Middle Ages;" and Turner's "History of the Anglo-Saxons."

the latter entirely assimilates with, or is melted down in the former, and must adopt its laws and customs. And, in pursuance of this maxim, there hath ever been, since the union of the heptarchy in king Egbert, a general acquiescence under the hereditary monarch of the West Saxons, through all the united kingdoms.*

From Egbert to the death of Edmund Ironsides, [the natural son of Ethelred, elected on his death,] a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption: save only that the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the Wittenagemote, in the heat of the Danish invasions; and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew, a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironsides was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, king of Denmark; and Canute, after the death of Edmund, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom, however, this new acquired throne continued hereditary, for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

* Whether Egbert, as has been generally supposed, assembled the Anglo-Saxon states, and abolishing the distinction of Saxons and Angles, and all provincial appellations, commanded the island to be called England, and procured himself to be called the crowned King of England, is strongly questioned by Turner, but asserted by Lappenburg.

[Edward the Confessor, being the legitimate son of Ethelred II., and having been superseded by his *illegitimate* brother Edmund, was in fact the true heir to the crown; at all events in preference to Edmund, or any child of his,*] On the decease of Edward the Confessor without issue, Harold II. † usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling, which signifies in the Saxon language, *illustrious*, or of *royal blood* [and was appropriated to designate the crown prince], who was the son of Edward the Outlaw, and grandson of Edmund Ironsides; or, as Matthew Paris well expresses the sense of our old constitution, "*Edmundus autem 'latus-ferreum, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum.*"

William the Norman claimed the crown by virtue of a pretended grant from king Edward the Confessor: a grant which, if real, was in itself utterly invalid; because it was made, as Harold well observed in his reply to William's demand, "*absque generali senatûs et populi conventu et edicto;*" which also plainly implies, that it then was generally understood, that the king, with consent of the general council, might dispose of the crown, and change the line of succession. [The coronation service of Ethelred II. (A. D. 978) is preserved in the Cotton Library, ‡ and affords strong evidence that the crown was then, a century after Alfred, elective; "when this is finished, the king shall be raised from the ground; and *having been chosen* by the bishops and people, shall, with a clear voice, &c."]

William's title, however, was altogether as good as

* Note by Mr. Justice Coleridge.

† Harold, says Lord Coke, is never named in Doom's-day Book, by the name of *king*, but per nomen *Comitis*.

‡ It may be seen at length in English, in Turner's "History of the Anglo-Saxons." Bk. viii. c. 1.

Harold's, who was a mere private subject [son of Godwin, earl of Kent], and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the crown, in the family which had newly acquired it.

The conquest, then, by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, all the inherent properties of the crown were, with it, transferred also. For, the victory obtained at Hastings, not being a victory over the nation collectively, but only over the person of Harold, the only right that the Conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties, the first and principal of which was its descendibility. *Here then we must drop our race of Saxon kings, at least for a while*, and derive our descents from William the Conqueror, as from a new stock, who acquired by right of war (such as it is, yet still the *dernier resort* of kings) a strong and undisputed title to the inheritable crown of England.

It descended, accordingly, from him to his sons, William II. (Rufus), and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents, though never adopted as the rule of public succession, that when the eldest son was already provided for, as Robert was constituted duke of Normandy by his father's will, in such a case the next brother was entitled to enjoy

the rest of their father's inheritance. But, as he died without issue, Henry had, at last, a good title to the throne, whatever he might have had at first.

Stephen, who succeeded him, was indeed the grandson of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right; not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was earl of Blois, and therefore seems to have waved, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I.; the rule of succession being, (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. [Stephen pretended to dispute Matilda's legitimacy, on the ground of a supposed nullity in her mother's marriage; that, as she had worn the veil, she could not lawfully contract marriage; but, as she had not taken vows, a council held by the archbishop, at Lambeth, pronounced her capable of marriage.*] Stephen was, therefore, little better than a mere usurper; and he rather chose to rely on a title by election, while the empress did not fail to assert her hereditary right by the sword; which dispute was attended with various success, and ended, at last, in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud, should succeed him; as he afterwards accordingly did.

Henry II. was, next after his mother Matilda [who was the daughter and heiress of Henry I., wife, first of the emperor Henry IV., and then of Geoffrey Plantagenet, count of Anjou], the undoubted heir of William the Conqueror; but he had also another connection in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironsides, the last of the Saxon race of here-

* Mr. Justice Coleridge's note, and Lord Lyttleton's Hist. Hen. II. B. I.

ditary * kings. For Edward the Outlaw, the son of Edmund Ironsides, had, beside Edgar Atheling, who died without issue, a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I., who by him had the empress Maud, the mother of Henry II. Upon which account, the Saxon line is, in our histories, frequently said to have been restored in his person: though, in reality, that right subsisted in the sons of Malcolm, by queen Margaret; king Henry's best title being as heir to the conqueror. [Henry II., in his own lifetime, crowned his eldest son Henry, who died before him; another evidence of the unsettled and precarious state of hereditary succession in those times.†]

From Henry II. the crown descended to his eldest son Richard I.,‡ who dying childless, the right vested in his nephew Arthur, the son of Geoffrey, his next brother; but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right: that is to say, that he was next of kin to the deceased king, being his surviving brother; whereas Arthur was removed one degree farther, being his brother's son, though, by right of representation, he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen may at this distance of time, appear to us, after the law of descents has been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered

* Ante, p. 114. It must be borne in mind, however, that Edmund Ironsides was the illegitimate son of Ethelred.

† Mr. Justice Coleridge's note.

‡ Richard I. is stated by Mr. Allen (Royal Prerog. p. 45.) to have been the first king of England who ascended the throne, without the form of an election, and without any interval between the death of his predecessor and his own accession; but Sir Harris Nicolás shows this to be an error.

ancestors. Nor indeed can we wonder at the number of partisans who espoused the pretensions of king John, in particular; since, even in the reign of his father king Henry II., it was a point undetermined, whether, even in common inheritances, the child of an elder brother should succeed to the land, in right of representation, or the younger surviving brother, in right of proximity of blood. Nor is it to this day decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of the degree, shall take place. However, on the death of Arthur and his sister Eleanor without issue, a clear and indisputable title vested in Henry III. the son of John; and from him to Richard II., a succession of six generations, the crown descended in the true hereditary line. Under one of this race of princes, we find it declared in parliament, [stat. 25 Edward III. st. 2], that "the law of the crown of England is, and always hath been, that the children of the king of England, whether born in England or elsewhere, ought to bear the inheritance, after the death of their ancestors. Which law our sovereign lord the king, the prelates, earls, and barons, and other great men, together with all the commons in parliament assembled, do approve and affirm for ever." [Edward I. died on the 7th July, 1307; but many documents show that the regnal year of his son and successor Edward II., began on the 8th, and ended on the 7th July. He succeeded to the crown, says Walsingham, "*non tam jure hereditario, quam unanimi assensu procerum et magnatum;*" which, with other passages, implies that the consent of the peers formed an important part of the title to the throne: and that recognition did not occur, in the case of Edward II., till the *eighth* of July; as is evidenced by an entry on the patent roll of the last year of Edward I.]

Upon Richard the Second's resignation * of the crown, he

* The documents brought to light by the record commissioners, seem wholly to disprove the current notion, that the death of Richard II. was

having no children, the right resulted to the issue of his grandfather Edward III. That king had many children besides his eldest, Edward, the Black Prince of Wales, the father of Richard II.; but to avoid confusion I shall mention only three; William, his second son, who died without issue; Lionel, duke of Clarence, his third son; and John of Gant, duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel duke of Clarence were entitled to the throne, upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in parliament. But Henry duke of Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with safety; and he became king, under the title of Henry IV. But, as sir Matthew Hale remarks, though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, which he was very much inclined to do, but as successor, descended by right line of the blood royal: as appears from the rolls of parliament in those times. And in order to this, he set up a show of two titles: one upon the pretence of being the first of the blood royal, in the entire male line; whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended: the other, by reviving an exploded rumour, first propagated by John of Gant, that Edmond earl of Lancaster, to whom Henry's mother was

either caused or accelerated, by Henry IV. or his council, by unfair means. See the matter fully explained in the Pref. (pp. xxvi to xxxii.) by Sir H. Nicolas, to vol. i. of "The Proceedings and Ord. of the Privy Council."

heiress, was in reality the elder brother of king Edward I., though his parents, on account of his personal deformity, had imposed him on the world for the younger; and therefore Henry would be entitled to the crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward III.'s time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's dominions, *shall be set and remain* in the person of our sovereign lord the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry IV. had been a rightful king. It however serves to show that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, sir Edward Coke more than once expressly declares, that, at the time of passing this act, the right of the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and VI.; in the latter of whose reigns the house of York asserted their dormant title; and, after embruing the kingdom in blood

and confusion for seven years together, at last established that title in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents and above threescore years, the distinction between a king *de jure*, and a king *de facto*, began to be first taken, in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom, by confirming all honours conferred, and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edward IV. c. 1. the three Henries are styled, "late kings of England in dede, and not of ryght." And, in all the charters which I have met with, of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*" [But with us, who are to weigh these ancient factions in he balance of wisdom and justice, there should be no hesitation, observes an eminent constitutional historian (Mr. Hallam, "Middle Ages," ch. viii. part 13) of the present day, "in deciding that the House of Lancaster were lawful sovereigns of England. If the original consent of the nation; if three descents of the crown; if repeated acts of parliament; if oaths of allegiance from the whole kingdom; if undisturbed, unquestioned possession during sixty years, could not secure the reigning family against a mere defect in their genealogy, when were the people to expect tranquillity? Every national government, however violent in its origin, becomes legitimate, when universally obeyed and justly exercised, the possession drawing after it the right; not certainly that success can alter the moral character of actions, or privilege usurpation before the tribunal of human opinion, or in the pages of history, but the recognition of a government by the people, is the binding pledge of their allegiance, so long as its corresponding duties are fulfilled. And then, says sir Matthew Hale, the law of England has been held to annex the subject's fidelity

to the reigning monarch, by whatever title he may have ascended the throne, and whoever else may be its claimant."]

Edward IV. left two sons and a daughter; the elder of which sons, king Edward V., enjoyed the regal dignity for a very short time [from the 9th April till the 20th June, 1483], and was then deposed by Richard, his unnatural uncle, who immediately usurped the royal dignity; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a show of some hereditary title: after which he is generally believed to have murdered his two nephews,* upon whose death the right of the crown devolved on their sister Elizabeth.

The tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond, to assert his title to the crown: one the most remote and unaccountable that ever was set up, and to which nothing could have given success, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded; the claim, such as it was, was through John earl of Somerset, a natural son of John of Gant and Catherine Swinford. It is true, that, by an act of parliament, 20 Rich. II., this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock; but still with an express reservation of the crown, "*exceptâ, dignitate regali.*" [The remarkable fact, however, was discovered by sir Harris Nicolas, that the patent, as originally granted by Richard II., does *not* contain the signal reservation (or exception) here mentioned: nor was it in the patent when it received the sanction of the legislature in 1397.

* Modern historians concur in this view. See Hallam's "Middle Ages," ch. viii., part 3, and Turner's "Hist. of England during the Middle Ages," vol. vi. p. 452, *et seq.* The latter concludes an interesting summary of the evidence for and against Richard's guilt, with the observation, that there seems no just reason for disbelieving the catastrophe of the two princes.

When, however, it was exemplified and confirmed, by Henry IV. in 1407, the words do appear, but evidently *then added*, by interlineation, and in ink different from that of the original patent. His object probably, was, to prevent any claim, on failure of his own issue, on the part of his father's children by Lady Swinford. If, therefore, this addition had no effect in law, (and Henry had no right to qualify the grant of his predecessor, or at all events interpolate a statute), Henry VII. was really, as he described himself, the lineal heir of John of Gaunt, and representative of the house of Lancaster.*]

Notwithstanding all this, immediately after the Battle of Bosworth Field, he assumed the regal dignity, the right of the crown then being, as sir Edward Coke expressly declares, in Elizabeth, eldest daughter of Edward IV.: and his possession was established by parliament, holden in the first year of his reign. In the act for this purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV.; and, therefore, as lord Bacon, the historian of this reign, observes, carefully avoided any recognition of Henry VII.'s right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way, as the noble historian expresses it, of *establishment*, and that, under covert and indifferent words, "that the inheritance of the crown should *rest*, *remain*, and *abide* in king Henry VII. and the heirs of his body;" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure*, or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the conqueror, and thereby, [putting an end to

* See "Excerpta Historica." London: Bentley, 1831.

the destructive contests of the two Roses], gained, as sir Edward Coke declares, by much his best title to the crown; [though it is difficult to see what title to the crown he could have gained, by marrying the rightful queen.*] Whereupon the act made in his favour was so much disregarded, that *it never was printed in our statute books*, [but may be seen at length in lord Coke's Fourth Institute, p. 37.]

Henry VIII., the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order; but in his reign, we at several times, find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Henry VIII. c. 12, reciting the mischiefs which have ensued, and may ensue, by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of such sons, to the lady Elizabeth, who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine, and to the lady Elizabeth's heirs of her body; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, as the crown of England hath been accustomed and ought to go, in case where there be heirs female of the same; and in default of issue female, then to the king's right heirs for ever. *This single statute is an ample proof of all the four positions we at first set out with.*†

But upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Henry VIII. c. 7; wherein the lady Elizabeth is also, as well as the lady Mary, made illegitimate,

* Mr. Justice Coleridge.

† Ante p. 159.

and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to *such persons as the king, by letters patent, or last will and testament, should limit and appoint the same.* A vast power; but notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and to the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown. [It is very singular that Blackstone makes no allusion to the power (except to say that it was never executed), reserved to Henry VIII. by the above acts, to appoint a successor to the throne, on the failure of issue of Edward, Mary, and Elizabeth, by a will in writing, "signed with *his own* hand." A will purporting to be thus executed, and dated the 30th December, 1546, a month before his death, is extant—drawn up in undoubted conformity with his instructions; but the great question among constitutional lawyers and antiquarians has been, whether the will was actually signed by the king, *propriâ manu.* If it were, then, on the death of Elizabeth, the crown should have gone to one of the living descendants of Mary duchess of Suffolk, and not to James I. The dispute is, whether Henry signed with his own hand, or whether, from his inability to write, a stamp was used, by the persons appointed by Henry to sign all public documents. The instrument is now to be seen in the Chapter House at Westminster. Lord Brougham and Mr. Hallam are among those who deem the will duly executed; but it has occasioned great dispute, especially among writers for and against the House

of Hanover. It is now of no practical importance, however: and if the Suffolk family believed the will valid, it is strange that they acquiesced in the accession of James; who, however, if the will were invalid, succeeded lawfully, by strict hereditary right. It is fearful to think what a door to divisions and civil wars was opened by Henry VIII. and Edward VI. thus tampering with the succession; which called into existence four competitors for the crown, on the death of Edward VI.: viz., Mary, Elizabeth, Mary queen of Scots, and lady Jane Grey.]

But,—lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession,—by statute 1 Mary, stat. 2, c. 1, queen Mary's hereditary right to the throne is acknowledged and recognised in these words: "The crown of these realms is most lawfully, justly, and rightly *descended and come* to the queen's highness that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match, the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, shall succeed in them, according to the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession shall continue in the usual course, seems tacitly to imply a power of new modelling and altering it, in case the legislature had thought proper. [There are extant instruments, both public and private, dated "in the first year of the reign of JANE, QUEEN OF ENGLAND;" and her proclamation, dated four days after the death of Edward VI., recites "that the imperial crown, and other the premises thereunto belonging, now be and remain to us in actual royal possession." The earliest of these instruments is dated the 9th, and the latest the 18th July, 1553; and by statute, provision was

made to meet the case (1 Mary, c. 4). Her husband was styled abroad, "king."*]

On queen Elizabeth's accession, her right is recognised in still stronger terms than her sister's; the parliament acknowledging "that the queen's highness *is, and in very deed, and of most mere right ought* to be, by the laws of God, and the laws and statutes of this realm, our most lawful and rightful sovereign, liege lady and queen; and that her highness is *rightly, lineally,* and *lawfully descended and come of the blood royal* of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her, the imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1, § 3, we find the right of parliament to direct the succession of the crown, asserted in the [following, among other] most explicit words. "If any person shall in anywise hold and affirm, or maintain, that the common laws of this realm, NOT ALTERED BY PARLIAMENT, ought not to direct the right of the crown of England; or that the queen's majesty that now is, with and by the authority of the parliament of England, is not able to make laws and statutes of sufficient force and validity to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof; every such person so holding, affirming, or maintaining, during the life of the queen's majesty, shall be judged a high traitor, and suffer and forfeit as in cases of high treason is accustomed, and every person so holding, affirming, or maintaining, after the decease of our said sovereign lady, shall forfeit his goods and chattels." [Moreover, by the fifth section of this important statute, it is enacted that "whosoever shall hereafter, during the life of our said sovereign lady, *by any book or work, printed or written,*

* See the pretensions of Lady Jane, under the acts and the will of Henry VIII. and Edward VI., examined by sir Harris Nicolas, in "Literary Remains of Lady Jane Grey," (A.D. 1825.)

directly and expressly declare and affirm, at any time BEFORE THE SAME BE BY ACT OF PARLIAMENT OF THIS REALM ESTABLISHED AND AFFIRMED, that any one particular person, whosoever it be, is or ought to be, the right heir and successor to the queen's majesty that now is, except the same be the natural issue of her majesty's body, or publish or spread such books or scrolls, or print, bind, or put to sale, or utter either, wittingly, shall for the first offence, suffer imprisonment for one whole year, and forfeit half his goods; and if any shall oftener offend therein, shall incur the pain and penalty of a *præmunire*."]

On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York, his queen; whose eldest daughter Margaret, having married James IV. king of Scotland, king James the Sixth of Scotland, and of England the First, was the lineal descendant from that alliance. [The other surviving daughter of Henry VII. was Mary, who married Louis XII. of France. On his death, three months afterwards, she almost immediately married Charles Brandon, duke of Suffolk (the last subject permitted to marry a princess of the blood royal), by whom she had two daughters — Frances, second duchess of Suffolk, and Eleanor, countess of Cumberland. The heirs of Mary Tudor, the first duchess, are living.*] In the person of James, as clearly as in Henry VIII., centred all the claims of different competitors, from the conquest downwards, he being indisputably the lineal heir of the conqueror. And, what is still more remarkable, in his person also centred the right of the Saxon monarchs, which had been suspended from the conquest, till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of

* See Hallam, Const. Hist. c. vi.

Edward the Outlaw, and grand-daughter of king Edmond Ironsides, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm, king of Scotland; and Henry II., by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered that Malcolm, by his Saxon queen, had sons as well as daughters; and that the royal family of Scotland, from that time downwards, were the offspring of Malcolm and Margaret. Of this royal family, king James I. was the direct lineal heir, and therefore united in his person every possible claim, by hereditary right, to the English as well as Scottish throne, being the heir of both Egbert and William the Conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution: and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament; who ["though no act was demanded by him to confirm his right, notwithstanding made one to preserve their own," *] by statute 1 Jac. I. c. 1, did "recognise and acknowledge that, immediately upon the dissolution and decease of Elizabeth, late queen of England, the imperial crown thereof did *by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next and sole heir of the blood royal* of this realm." Not a word here of any right immediately derived from heaven: which, if it existed anywhere, must be sought for among the aborigines of the

* Argument of the Commons in favour of the Exclusion Bill.

island, the ancient Britons; among whose princes, indeed, some have gone to search it for him.*

[It might possibly have been James's misgivings as to the defect in his parliamentary title, arising out of the claims existing under the will of Henry VIII.† that led him to magnify, still more than he was naturally disposed to do, the inherent rights of primogenitary succession, as something indefeasible by the legislature—a doctrine in diametrical opposition, as we have seen, to our laws and constitution. The will of Henry VIII. was on all sides tacitly and wisely consigned to oblivion, on such substantial grounds of public expediency, as it would have shown an equal want of patriotism and good sense for the descendants of the House of Suffolk to have withstood.‡]

Wild and absurd as the doctrine of divine right undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son and heir, king Charles I., should be told by those infamous judges who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy, to all future ages; as they proved at last to the then deluded people; who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the estates, *restored the right heir of the crown*. And in the proclamation for that purpose, which was drawn up and

* Elizabeth of York, mother of Margaret of Scotland, was heiress of the House of Mortimer, which, by its descent from Gladys, sister of Llewellin ap Jorwerth the Great, had the true right to the principality of Wales. [Note by Blackstone, referring to Carte's Hist., vol. iii. 705.]

† Ante, p. 183.

‡ See Hallam's Constit. Hist., c. vi., and Mr. Hargrave's Preface to Hale's "Jurisdiction of the House of Lords," pref. clv., note (*n n.*)

attended by both houses, they declared, "that, according to their duty and allegiance, they did heartily, joyfully, and unanimously acknowledge and proclaim, that, *immediately upon the decease of our late sovereign lord king Charles, the imperial crown of these realms did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, Charles II., as being lineally, justly, and lawfully, next heir of the blood royal of this realm;* and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs, and posterity for ever. [With James I. began that struggle between the crown and the parliament, which ultimately led to the full establishment of our free constitution—a struggle which descended to his unfortunate son, Charles I., with that crown, and lined it with thorns.* No one, however, should form or express an opinion, with confidence, as to the fact, the mode, and extent of exceeding their respective rights, by either party to these struggles, who has not first endeavoured to ascertain what really were, and what each may have deemed *at the time* to be, such rights, as they then existed; not as now, after the lapse of two centuries, when rights have become better defined, and, as the result, civil liberty more firmly established.]

Thus, I think, it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath ever† been an HEREDITARY crown; though subject to LIMITATIONS by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted, or exercised, this right of altering and limiting the succession: a right, as we have seen, before exercised and asserted, in the reigns of Henry IV., Henry VII., Henry VIII., queen Mary, and queen Elizabeth.

The first instance, in point of time, is the famous BILL

* See Lord Brougham's Polit. Phil. chap. 27.

† Ante, p. 114.

OF EXCLUSION [as it was popularly called], which raised such a ferment in the latter end of the reign of King Charles II. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the Duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords;* the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary, else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance, else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the *power*, but merely the *propriety*, of an exclusion. However, as the bill took no effect, king James II. succeeded to the throne of his ancestors.

[The history of the Exclusion Bill is worthy of careful study, because it was the stern forerunner of the revolution of 1688, and signally illustrates the great principles enunciated in this chapter, concerning the succession to the throne. The bill was entitled, "*A bill to disable the Duke of York from inheriting the imperial crown of the realm;*" and proposed to enact that "he should be incapable of inheriting the crowns of England, Scotland, and Ireland, with their dependencies, and of enjoying any of the titles, rights, prerogatives, and revenues belonging to the said crowns;" that "in case his majesty [Charles II.] should die or resign his dominions, they should devolve to *the prince next in succession*, in the same

* The bill was introduced by Lord Russell, and persevered with, and carried by a large majority through the commons, though the king sent a message intimating that he would not consent to alter the succession. When Lord Russell carried up the bill to the lords and read out the title, the members behind him gave a great cheer.

manner as if the said duke were dead;" with several other very stringent provisions, declaring him guilty of high treason, if he should "perform any acts of sovereignty and royalty," or "ever return into any of these dominions." The reason for taking these steps was recited in the preamble to be, that "emissaries, priests, and agents for the Pope, had traitorously seduced James Duke of York, presumptive heir to these realms, to the communion of the church of Rome, and had induced him to enter into negotiations with the Pope for promoting Romish interests, and by his means had advanced the power and greatness of the French king, to the manifest hazard of these kingdoms; and that by the descent of these crowns upon a Papist, and by foreign alliance and assistance, they might be able to succeed in their wicked and villainous designs." The secretary of state, Sir Leoline Jenkins, resisted it, mainly, on the broad and high ground "that the kings of England had their right from God alone, and that no power on earth could deprive them of it." To this it was answered, that admitting the right to be from God alone, it should have been specified wherein the "right" consisted; and that it never could be proved, that the kings of England had power to alter the constitution, or introduce a new religion; but if by the "right" was understood that of succession only, the principle was false; as might be proved by numbers of instances in the English succession; for all the kings and queens since Henry VII. mounted the throne by a purely parliamentary right, which by an act had settled the succession on the posterity of that prince, and had since confirmed that act by others. To prove the *legality* of the exclusion, they cited those instances specified in this chapter; and concluded that it was impossible for a parliament, considered as composed of king, lords, and commons, to act anything *contrary to the laws*, since their power to repeal old and enact new laws was never disputed—that the supreme and absolute authority resided

in the parliament, so composed; for what is it but a body consisting of all the members of the state, to which no power on earth has a right to prescribe? The bill was rejected by the lords, by a majority of 63 against 30, through the desperate exertions of the king, who was present during the whole debate. In the next parliament the bill was introduced again into the commons, with the secretary of state for its solitary opponent, who was received contemptuously. The bill passed again, when the king suddenly dissolved the parliament, which proved the last of his reign; and from that moment he reigned, not only without a parliament, but with absolute power, by skilfully availing himself of the violence of party; and the doctrine of passive obedience, and non-resistance of the Divine right of monarchy, and the sister doctrine of indefeasible right of succession, burst into full and fell bloom.]

James II. might have enjoyed the throne during the remainder of his life, but for his own infatuated conduct, which, with other concurring circumstances, brought on THE REVOLUTION in 1688.

The true ground and principle upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the Lords and Commons, met in a Convention upon a supposition of this vacancy, both houses came to this resolution:—"That King James II. having endeavoured to subvert the constitution of the kingdom, by breaking the ORIGINAL CONTRACT* between

* See post. p. 144, for an explanation of these words, and the sense in which they are here used.

king and people; and, by the advice of jesuits and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of this kingdom, has ABDICATED the government, and that the THRONE IS THEREBY VACANT." [The word "*abdicated*," is not to be understood as having been used in its ordinary sense, to denote a voluntary resignation of the crown. It was a somewhat gentler form of expression than "*forfeited*," which was the thing meant, and the word actually proposed by one of the parties to that great transaction.] Thus ended, at once, by this sudden and unexpected vacancy of the throne, the old line of succession, which, from the conquest, had lasted above six hundred years, and, from the union of the heptarchy in King Egbert, almost nine hundred. The facts, themselves, thus appealed to;—the king's endeavour to subvert the constitution, by breaking the original contract; his violation of the fundamental laws; his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from the facts, namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant,—it belonged to our ancestors to determine. For whenever a question arises between the Society at large, and any magistrate vested with powers originally delegated by that Society, it must be decided by the voice of the Society itself; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole Society. The reasons upon which they decided, may be found at large in the parliamentary proceedings of the times. I choose rather to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience

because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty, at this distance of time, to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

But while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws, it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points, owing to the peculiar circumstances of things and persons, it was not altogether so perfect as might have been wished, yet from thence a new æra commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular, it is worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an endeavour to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke, which would have reduced the Society almost to a state of anarchy; would have levelled all distinctions of honour, rank, office, and property; would have annihilated the sovereign power, and in consequence repealed all positive

laws; and left the people at liberty to erect a new system of state, upon a new foundation of polity. They therefore very prudently voted it to amount to no more than *an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king.* And thus the constitution was kept entire; which, upon every sound principle of government, must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single *postulatum*, the vacancy of the throne, being once established, the rest that was then done, followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication, as if the blood royal should fail without any successor appointed by parliament); if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy, in such manner as they judged the most proper. And this was done by their Declaration of 12th February, 1688, in the following manner: "that William and Mary, prince and princess of Orange, be, and be declared KING AND QUEEN, to hold the crown and royal dignity, during their lives, and the survivor of them; and that *the sole and full exercise of the regal power be only in, and executed by, the said prince of Orange*, in the names of the said prince and princess, during their joint lives: and after their deceases the said crown and royal dignity to be to the heirs of the body

of the said princess; and for default of such issue, to the princess Anne of Denmark and the heirs of her body; and for default of such issue, to the heirs of the body of the said prince of Orange." [In conformity with this Declaration, all the statutes of their reign purport to be "enacted by the king's and queen's most excellent majesties." The whole revolution was near miscarrying, because of the prince and princess of Orange being declared king and queen; but William was inflexible, and the Tory lords most reluctantly yielded. He addressed them thus:—"They might have a regent, no doubt, if they thought proper, but *he* would not be that regent; they might wish him, perhaps, to reign in right, and during the lifetime, of his wife, but he would submit to nothing of the sort; and should certainly, in either case, return to Holland, and leave them to settle their government in any manner they thought best!"

[On the 13th February, the prince and princess of Orange, being seated on two large chairs, under a canopy of state in the banqueting house, both houses of the convention attended them, in a full body, to offer them the crown; but before making that solemn tender, caused the clerk of the crown to read aloud to them that famous Declaration of the lords spiritual and temporal, and commons, assembled at Westminster, afterwards embodied in an act of parliament. After reading it, the speaker of the house of lords made a solemn tender of the crown to their highnesses, in the name of both houses; whereupon the prince of Orange receiving it, returned the following answer:—

["My lords and gentlemen,—This is certainly the greatest proof of the trust you have in us, that can be given, which is the thing that makes us value it the more, and we thankfully accept what you have offered.

["And as I had no other intention, in coming hither, than to preserve your Religion, Laws, and Liberties, so you may be sure that I shall endeavour to support them, and shall be willing to concur in anything that shall be for the

good of the kingdom, and to do all that is in my power to advance the welfare and glory of the nation."

[The same day they were proclaimed king and queen, by the names of WILLIAM and MARY, to the inexpressible joy of the people.

[The act above referred to, recited the above Declaration, its presentation, and the tender and acceptance of the crown; the seventh section running thus:—

[" And the lords spiritual and temporal, and commons, seriously considering how it hath pleased Almighty God, in His marvellous providence and merciful goodness to this nation, to provide and preserve their said majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him, from the bottom of their hearts, their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognise, acknowledge, and declare that king *James* the second having abdicated the government, and their majesties having accepted the crown and royal dignity as aforesaid, their said majesties did become, were, and are, and of right ought to be, by the laws of this realm, our sovereign liege lord and lady, king and queen of *England*, *France*, and *Ireland*, and the dominions thereunto belonging, in and to whose princely persons the royal state, crown and dignity of the said realms, with all the honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining are most fully, rightfully, and intirely invested and incorporated, united and annexed."]

Perhaps, upon the principles before established, the Convention might, if they had pleased, have vested the regal dignity in a family entirely new, and strangers to the royal blood; but they were too well acquainted with the benefits of hereditary succession, and the influence which it has, by custom, over the minds of the people, to depart any further from the ancient line, than temporary necessity and self-preservation required. They therefore settled the crown,

first on king William and queen Mary, king James's eldest daughter, for their joint lives; then on the survivor of them; and then on the issue of queen Mary; upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that, to the issue of king William, who was the grandson of Charles I., and nephew, as well as son-in-law, of king James II., being the son of Mary, his eldest sister. This settlement included *all the protestant posterity* of king Charles I., except such other issue as king James might at any time have, which was totally omitted, through fear of a popish succession. And this order of succession took effect, accordingly.

These three princes, therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right, or *descent*, but by way of donation, or "*purchase*," as the lawyers call it: by which they mean, any method of acquiring an estate, otherwise than by descent. The new settlement did not consist merely in excluding king James, and the person pretending to be prince of Wales, and then suffering the crown to descend in the old hereditary channel; for the usual course of descent was in some instances broken through; and yet the Convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may remember that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly, therefore, these princes were successively in possession of the crown, by a title different from the usual course of descent.

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes had died with the duke of Gloucester, that the king and parliament thought it necessary *again to exert their power of limiting and appointing the succession*, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously, by the statute of 1 W. & M., st. 2, c. 2, enacted that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded, and for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act, therefore, consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess SOPHIA, electress and duchess dowager of HANOVER, the most accomplished princess of her age. For, upon the impending extinction of the *protestant* posterity of Charles I., the old law of regal descent directed them to recur to the descendants of James I.; and the princess Sophia, being the youngest daughter of Elizabeth, queen of Bohemia, who was the daughter of James I., was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, *being protestants*, the remainder of the crown, expectant on the death of king William and queen Anne, without issue, was settled by statute 12 & 13 W. III., c. 2. And at the same time it was enacted, that whosoever should

hereafter come to the possession of the crown, should join in the communion of the church of England, as by law established.

[Mr. Hume, in his essay "On the Protestant Succession," alleges the disadvantages of it to consist in the foreign dominions possessed by the princes of the Hanover line, and which might engage us in continental wars and intrigues. All danger on that score, however, lately ceased, on the accession to his throne of the present king of Hanover, where the Salic law prevails; and, in fact, the great historian, but strong partisan of the Stuarts, thus impressively states the advantages resulting to the nation, of the settlement in the house of Hanover:—"The princes of that family, without intrigue, without cabal, without solicitation on their part, have been called to mount our throne, by the united voice of the whole legislative body. They have since their accession displayed, in all their actions, the utmost mildness, equity, and regard to the laws and constitution. Our own ministers, our own parliaments, ourselves, have governed us; and if aught ill has befallen us, we can blame only fortune,* or ourselves. What a reproach must we become among nations, if, disgusted with a settlement so deliberately made, and whose conditions have been so religiously performed, we should throw everything again into confusion, and by our levity and rebellious disposition, prove ourselves totally unfit for any state but that of absolute slavery and subjection."]†

This is the last limitation of the crown that has been made by parliament; and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the queen and parliament, to new model or alter the succession. And, indeed, it is now again made highly penal to dispute it; for by the statute 6 Ann. c. 7,

* It must be remembered that it is David Hume who uses this language.
† Essay xv., 490. Edit. 1817.

it is enacted that "if any person shall maliciously, advisedly, and directly, *by writing, or printing*, maintain and affirm that the kings or queens of this realm, with and by the authority of parliament, are not able to make laws and statutes of sufficient force and validity, to limit and bind the crown, and the descent, limitation, inheritance, and government thereof, he shall be guilty of high treason, and being lawfully convicted thereof, shall be adjudged a traitor, and suffer pains of death; and if he shall maliciously and directly, by preaching, teaching, or advised *speaking*, declare, maintain, and affirm the same, he shall incur the danger and penalty of a *præmunire*."

The princess Sophia dying before queen Anne, the inheritance thus limited, descended on the son and heir of the princess Sophia, the Elector of Hanover, afterwards GEORGE I.; and, having, on the death of queen Anne, taken effect in his person, from him descended to king George II.; from him to his grandson and heir, king George III.; [from him, to his son king George IV., who was succeeded by his brother king William IV.; from whom it descended to his niece and heiress, daughter of his deceased brother Edward Duke of Kent, our present gracious sovereign QUEEN VICTORIA, whom God long preserve.]

Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary, as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the Conqueror; afterwards, in James the First's time, the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir, without any restriction: but now, upon the new settlement, the inheritance is

conditional; being limited to such heirs only of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which Societies were formed and are kept on foot. Where the magistrate, upon every occasion, is elected by the people, and may by the express provision of the laws be deposed, if not punished, by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student, in its true and genuine light; it is the duty of every good Englishman to [redacted], to revere, and to defend it.

[The grave and restrained tone in which Blackstone speaks of the revolution of 1688, has not escaped animadversion; and he has been accused of slurring over, with lukewarm and qualified eulogy, the most glorious event in our annals; where it stands recorded in letters of light, shining, if possible, more brightly than ever, through the interval of more than a century and a half. He has been charged with representing that event as incapable of standing on its own substantial merits; as one of those

equivocal measures which can be vindicated only on the ground of an "*authority*," in which we are bound to "acquiesce." There is, undoubtedly, a certain timidity of tone throughout the paragraphs under consideration; but sundry passages in them, and in other portions of the commentaries, exhibit a spirit fully capable of appreciating the greatness of the principles involved in that glorious enterprise on behalf of civil and religious liberty. Those who conducted it were characterised by equal boldness, sagacity, and moderation, the rich fruit of which has been ever since enjoyed, under the blessing of God, by their grateful posterity.

[No one can pretend to the name of a student of the laws and constitution of England, who has not deliberately considered the revolution of 1688, in all its aspects and bearings, religious, moral, legal, and political—as well in the events which led to it, as the doctrines involved in the critical and momentous parliamentary discussions of that day, the general nature of which is sufficiently indicated in the text. Moreover, the revolution of 1688, it has been well observed,* should be called, humanly speaking, *fortunate*, and then glorious. If the student can but place himself in the midst of those occurrences, and suppose himself ignorant of what is to happen, it is with a sort of actual fear and trembling that he will read the history of those times. Let him consider what his country has become by the successful termination of these transactions, and what it might have been rendered by a contrary issue; how much the interests of Europe were, at this juncture, identified with those of England; and what a variety of events, the most slight and natural, might have thrown all things into a state of confusion and defeat. Our ancestors, who steered the state vessel through that perilous passage, have left on record for ever † a devout acknowledgment of their thankfulness to

* See Smyth's Lectures on Modern History. † Ante, p. 197.

Almighty God for His "marvellous Providence and merciful guidance vouchsafed to the nation."

[The constitutional monarchy of England, must be regarded as a happy and noble compromise, between those antagonist forces, Liberty, and Authority. The terms of that compromise, settled with punctilious precision, as was fitting, must be observed with hearty fidelity, as the condition of the national welfare. The Queen of England is the radiant centre of social order, authority, strength, and dignity; the visible representative of the majesty of the state. Love for her person, and reverence for her office, are hallowed by duly considering Whose authority she hath, that of Him who is the God and Father of us all, and whose service is perfect freedom.]

CHAPTER XIX.

THE QUEEN, AND THE PRINCE CONSORT.

[THE Queen Regnant, Regent, or Sovereign, is she who holds the crown in her own right,—as did the first, and perhaps the second, queen Mary, queen Elizabeth, queen Anne; and as does now our present gracious sovereign queen Victoria,—with the same powers, prerogatives, rights, dignities, and duties, as if she had been king....

[The first queen that sate on the throne of England, was MARY: and the statute 1 Mary, sess. 3, c. 1, entitled, "An act declaring that the regal power of this realm is in the queen's majesty, as fully and absolutely as ever it was in any of her most noble progenitors, kings of this realm," recites that "the most ancient statutes of this realm, being made by *kings* then reigning, do not only attribute and refer all prerogative, pre-eminence, power, and jurisdiction royal unto *the name of the king;* by occasion whereof the malicious and ignorant persons may be hereafter induced and persuaded unto this error and folly, to think that her highness could nor should have, enjoy, and use such like royal authority, power, pre-eminence, prerogative, and jurisdiction; nor execute and use all things concerning the said statutes, and take the benefit and privilege of the same, nor correct and punish offenders against her most royal person, and the regality and dignity

of the crown of these realms, and the dominions thereof, *as the kings* of this realm, her most noble progenitors, have heretofore done, enjoyed, used, and exercised. For the avoiding and clear extinguishment of which said error or doubt,* and for a plain DECLARATION of the laws of this realm in that behalf," the statute then enacts, "*That the law of this realm is, and ever hath been*, and ought to be understood, that the kingly or regal office of this realm, and all dignities, prerogatives, royal power, pre-eminences, privileges, authorities, and jurisdictions thereunto annexed, united, or belonging, being invested in either male or female, are, and be, and ought to be, as fully, wholly, absolutely, and entirely deemed, judged, accepted, invested, and taken in the one, as in the other."

[This, therefore, is simply an act declaratory of the ancient common law of the realm: and queen Mary accordingly ascended the throne, on the death of her brother Edward VI., as his heir and successor, according to the second of the four maxims of the succession to the throne already explained.†

[The legal style and designation of the queen of England is, as settled by the first article of the union with Ireland,‡ "VICTORIA, BY THE GRACE OF GOD, OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, QUEEN, DEFENDER OF THE FAITH." She is also "Sovereign Protector of the United States of the Ionian Islands."

[The husband of the queen regnant, is to all intents and purposes, her subject; as prince George of Denmark to queen Anne, and prince Albert of Saxe Coburg and Gotha, to queen Victoria: and is consequently within the meaning of the law relating to high treason. Previously to his marriage, prince Albert was "naturalised to all intents and purposes

* This is an allusion to notions then current concerning the Salic law.
† Ante, p. 161. ‡ Ante, p. 78.

whatsoever, as if his royal highness had been born within this realm," by statute 3 & 4 Vict., c. 2, on his taking, as therein prescribed, the oaths of allegiance and supremacy, before the lord chancellor. By virtue of this act, and one immediately preceding it, dispensing with certain others, which will be hereafter noticed, he became capable of being a member of the privy council, and was appointed such by the queen; but etiquette, it would appear, requires, in such a case, the oath of a privy councillor to be dispensed with: he is, in point of law, however, as responsible for his acts and advice in that capacity, as any other privy councillor.

[By a subsequent act of the same session (c. 52), provision was made for the administration of the government, in case the crown should descend to any issue of her majesty, whilst such issue should be under the age of eighteen years: measures requisite, as the act recites, "to maintain unimpaired the power and dignity of the crown, and thereby to strengthen the securities which protect the rights and liberties of the people." It then enacts that, if on "the demise of her majesty, there shall be issue of her majesty who shall become and be king or queen of this realm, under the age of eighteen years, the prince consort shall be the guardian of such issue, till they shall have attained the age of eighteen years, and be empowered, in the name of such issue, and in his or her stead, and under the style and title of regent of the United Kingdom, to exercise, according to the laws and constitution thereof, the royal power and government of this realm; first taking, before the privy council, the oaths of allegiance, supremacy, abjuration, and the two special oaths provided by the act—one, truly and faithfully to execute the office of regent, administer the government according to the laws, customs, and statutes of the realm, and consult and maintain the safety, honour, and dignity of the sovereign, and the welfare of the people; the other, inviolably to maintain and preserve the settlement of the true protestant religion:

but the regent is disabled from giving the royal assent to any bill for repealing, changing, or in any respect varying from the order and course of succession to the crown the act of uniformity, or for establishing the church of Scotland. The king or queen, while a minor, is disabled from marrying, under the age of eighteen, without the previous written consent of the regent, and the assent of both houses of parliament; and it is made high treason to act, aid, abet, or be concerned in bringing about any such marriage. Finally, the regency is to cease altogether, in the event of the regent becoming, or marrying, a Roman Catholic, or ceasing to reside in, or absenting himself from, the United Kingdom. Such are the well-considered provisions of the legislature, against a contingency which the queen's loyal subjects hope may never arise.]

CHAPTER XX.

THE ROYAL FAMILY.

[1 Bla. Com., 219—226.]

I. [When the reigning sovereign is a king,] the first and most considerable branch of his royal family, regarded by the laws of England, is THE QUEEN CONSORT; who, by virtue of her marriage, is participant of divers prerogatives above other women.

And, first, she is A PUBLIC PERSON, exempt and distinct from the king; and not, like other married women, so closely connected, as to have lost all legal or separate existence, so long as the marriage continues. For she is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do: a privilege as old as the Saxon æra. She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina, conjux divi imperatoris*, of the Roman laws; who, according to Justinian, was equally capable of making a grant to, and receiving one from, the emperor. The queen consort has separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his

majesty's courts, together with the king's counsel. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will. In short, she is, in all legal proceedings, looked upon as a feme sole, and not as a feme covert,—as a single, not as a married woman. For which, the reason given by sir Edward Coke, is this: because the wisdom of the common law would not have the king, whose continual care and study is for the public, and *circa ardua regni*, to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she were an unmarried woman. [The queen consort has also the disposition of her servants, exclusively of the king; so that an appointment by the king, of one to be saddler to the queen, is void: "for he ought to be a servant to the queen, by her own grant."*]

Though the queen consort be in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason, by the statute 35 Edward III., to compass or imagine the death of 'our lady the king's companion,' as of the king himself.—If she be accused of any species of treason, she shall, whether consort or dowager, be tried by the peers of parliament; as queen Ann Boleyn was, in 28 Henry VIII., [and queen Caroline in the reign of George IV., in the year 1820, on a Bill of Pains and Penalties, on charges therein alleged "deeply to affect, not only the honour of the queen, but the dignity of the crown, and the moral character of the country."]

II. A QUEEN DOWAGER is the widow of the king, and as such enjoys most of the privileges belonging to her as queen

* Comyns' Digest, Title *Roy*, F. 1.

consort. But it is not high treason to conspire her death, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager, without special licence from the sovereign, on pain of forfeiting lands and goods. This, sir Edward Coke tells us, was enacted in parliament in 6 Henry VI., though the statute be not in print. But she, though an alien born, is entitled, by the common law, to dower after the king's demise, which no other alien is [though this was, till recently, otherwise, in the case of a subject]. A queen dowager, when married again to a subject, does not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meredith, ap Theodore, commonly called Owen Tudor; yet by the name of Catherine, queen of England, maintained an action against the bishop of Carlisle. [The foregoing proposition is not really illustrated by the case of Catherine; inasmuch as her marriage with Tudor was carefully concealed, and not discovered till after her burial: when it produced great public excitement and uproar, as she left four children. It is needless to remind the reader, that Tudor proved the ancestor of a new dynasty of British sovereigns.] And so the queen dowager of Navarre, marrying with Edmond earl of Lancaster, brother to king Edward I., maintained an action of dower, after the death of her second husband, by the name of queen of Navarre.

III. The Prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the queen, are likewise peculiarly regarded by the laws. For, by statute 25 Edward III., to compass or conspire the death of the former, or violate the chastity of either of the latter, are as much high treason, as to conspire the death of the king, or violate the chastity of

the queen. And this upon the same reason, as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal; and the eldest daughter of the king [or queen] is inheritable alone to the crown, as we have seen, on failure of issue male, and therefore more respected by the laws than any of her younger sisters. The heir apparent to the crown is usually made prince of Wales, and earl of Chester, by special creation, [by letters patent under the great seal, as in the case of the present prince of Wales, on the 8th December, 1841.—It is singular that Edward VI. was never created prince of Wales; but from what motive on the part of his father, can be only conjectured. His title was prince of *England;* by which, moreover, he was elected, but never admitted, into the Order of the Garter. On the authority of Hume, the earliest annotator* on the text states, that Henry VIII. created Mary and Elizabeth princesses of Wales, each being at the time heir *presumptive* only. This is undoubtedly, however, erroneous; for not only are there no patents of such creation extant, but Mary and Elizabeth are never called princesses of Wales by any contemporary authority.] Being the queen's eldest son, the prince of Wales is, by inheritance, duke of Cornwall, without any new creation, but only for the life of his mother; for the descent of the crown takes the duchy out of him, and vests it in the eldest son and heir apparent.

The younger sons and daughters of the queen, and other branches of the royal family, who are not in the immediate line of succession, were little farther regarded by the ancient law, than to give them a certain degree of precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Henry VIII., c. 10, [the statute of precedency,] which enacts that no person, except the king's children, shall presume to sit or have

* Mr. Christian.

place at the side of the cloth of estate, in the parliament chamber; and that certain great officers therein named, shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke explains to signify grandson, or *nepos*), or brother's or sister's son. Therefore, after these degrees are passed, peers, or others, of the blood-royal, are entitled to no place or precedence, except what belongs to them by their personal rank or dignity.

In 1718, upon a question referred to all the judges by king George I., it was resolved, by the opinion of ten against the other two, that the education and care of all the king's grandchildren, while minors, belonged of right to his majesty, as king of this realm, even during their father's life: but they *all* agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion, that this care and approbation extended also to the presumptive heir of the crown: though to what other branches of the royal family the same extended, they did not find precisely determined. The most frequent instances of the crown's interposition, go no farther than nephews and nieces: but examples are not wanting of its reaching to more distant collaterals. And now, by statute 12 Geo. III., c. 11, no descendant of the body of king Geo. II., other than the issue of princesses married into foreign families, is capable of contracting matrimony, without the previous consent of the king, signified under the great seal; and any marriage contracted without such consent, is void: Provided, that such of the said descendants, as are above the age of twenty-five, may, after a twelvemonths' notice, given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons, solemnizing, assisting, or being

present at, any such prohibited marriage, shall incur the penalties of the statute of *præmunire*.

[This statute, commonly called "The Royal Marriage Act," became the subject of elaborate discussion before a committee of privileges, in the house of lords, in the year 1844; when it was held unanimously by the law lords, in conformity with the unanimous opinion of the judges, that the statute in question prohibits the contracting of marriage, and annuls any already contracted, in violation of its provisions, wherever the same may be contracted or solemnized, either within the realm of England, *or without*. This was decided in the *Sussex Peerage* case, in which Augustus Frederick D'Este presented a petition to the queen, claiming to be duke of Sussex, as son of Augustus Frederick duke of Sussex, sixth son of king George III., by lady Augusta Murray, second daughter of the earl and countess of Dunmore; to whom he was married, at Rome, on the 4th April, 1793, by a clergyman of the church of England, in form, as much as might be according to the rites of the church of England; each party immediately executing a document affirming the marriage, couched in most solemn and affecting language. It was however decided, that whether the marriage might or might not be valid by the law of Rome, the statute in question rendered it invalid by the law of England.*]

* The Sussex Peerage, 11 Clark and Finelly, 85.

CHAPTER XXI.

THE QUEEN'S COUNCILS.

[1 Bla. Com., 227—232.]

In order to assist the queen in the discharge of her duties, the maintenance of her dignity, and the exertion of her prerogative, the law has assigned her a diversity of councils to advise with.

1. The first of these is the HIGH COURT OF PARLIAMENT, which has been already treated at large. [It may, however, be questioned, whether the term "court," though used by most of our authorities in the law, including Coke and Hale, be the proper designation of parliament, in its *legislative* capacity. It is, then, properly the "*great council of the nation* (*commune consilium regni*) assembled in parliament;" while the high court of parliament (*magnum consilium*) designates the house of lords, in its judicial capacity. The house of commons never had any pretensions to be considered a *court;* and, on the contrary, has expressly disclaimed it. They solemnly protested against responsibility for the deposition of Richard II., on the ground that "the judgments of parliament appertained exclusively to the king and the lords, and not to the commons;" and in the 1 Henry VII. the twelve judges expressly affirmed the same proposition.]

2. Secondly, the PEERS OF THE REALM are, individually hereditary counsellors of the crown, and [with the spiritual lords] may be called together by the queen, to impart their advice, in all matters of importance to the realm, either in time of parliament, or, which has been their principal use, when there is no parliament in being.

Many instances of conventions of the peers, to advise the king, are to be found under our ancient monarchs; though the formal method of convoking them had been, by reason of the more regular meetings of parliament, so long left off, that when king Charles I., in 1640, issued out writs under the great seal, to call a great council of all the peers of England, to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for, and consult as many of the nobility as could easily be got together; as was particularly the case with king James the Second, after the landing of the prince of Orange; and with the prince of Orange himself, before he summoned that convention parliament, which afterwards called him to the throne. [There is another attribute belonging to the peers, collectively, in parliament assembled: As a council of state, they may address the crown upon any question of foreign or domestic policy, recommending, for instance, or deprecating, peace or war, a change of ministry, or a dissolution of parliament.]*

It is usually, also, looked upon to be the right of each particular peer of the realm, to demand an audience of the queen, and to lay before her, with decency and respect,

* See Mr. Macqueen's "Practice of the House of Lords and Privy Council," p. 18.

such matters as he shall judge of importance to the public weal.

3. A third council belonging to the queen, are, according to sir Edward Coke, her judges of the courts of law, for law matters. [No distinction is here made, between the judicial opinions pronounced by the judges in their courts, or in parliament, when advised with by the lords, or when extra-judicially consulted by the queen. This last function is, if it be recognised at all, to be exercised with great reserve, lest it should in any degree interfere with their judicial capacity.* The extent of such right is not clearly ascertained by either precedent, or authority.]

4. But the principal council belonging to the queen, is her PRIVY† COUNCIL: a term, however, which does not appear to have been generally used, till after the reign of Henry VI. According to sir Edward Coke's description of it, this is a noble, honourable, and reverend assembly, of the king, and such as he wills to be his privy council, in the king's court or palace. The queen's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was twelve, or thereabouts. Afterwards, it increased to so large a number, that it was found inconvenient, for secrecy and despatch; and therefore king Charles II., in 1679, limited it to thirty: whereof fifteen were to be the principal officers of state, and those to be counsellors, *virtute officii;* and the other fifteen were composed of ten lords and five commoners of the king's choosing. But since that time the number has been much augmented, and now continues indefinite. [In the present year (1855) its numbers amount to one hundred and ninety-one.]

* Various instances of the judges answering, and refusing to answer, such questions, are collected by Mr. Hargrave, in a note to Co. Litt. 110*a*, Note (*5*).

† *i.e.* Secret.

Privy counsellors are made by the queen's mere nomination, without either patent or grant: and, on taking the necessary oaths, they become immediately privy counsellors* during the life of the sovereign that chooses them, but subject to removal at her discretion.

As to the qualifications of members to sit at this board; any natural-born subject of England, or alien naturalised by act of parliament, is now capable of being a member of the privy council on taking the proper oaths. In order to prevent any persons under foreign attachments, from insinuating themselves into this important trust, as happened in the reign of king William, in many instances, it was enacted by the Act of Settlement, that no person born out of the dominions of the crown of England, unless born of English parents, even though naturalised by parliament, should be capable of being of the privy council. [At the commencement of the reign of George I., moreover, it was enacted that no one should be for the future naturalised by parliament, except subject to a disability to become, amongst other things, a member of the privy council. This act was expressly dispensed with by the legislature, in the case of Prince Albert (3 and 4 Vict. c. c. 1, 2); and four years afterwards, the restriction was removed, in every case of parliamentary naturalisation, by stat. 7 and 8 Vict. c. 66, § 1, 2. If the naturalisation, however, be effected by the *certificate* of the Secretary of State, under that act, the alien is expressly declared (§ 6) not to be capable of becoming of her Majesty's privy council.]

The duty of a privy counsellor appears from the oath of office, consisting of seven articles [which may be seen at large in lord Coke's Fourth Institute, p. 54]: 1. To advise the queen according to the best of his cunning and discretion. 2. To advise for the queen's honour, and good of the public, without partiality through affection, love, meed,

* Indicated by the title "Right Honourable."

doubt, or dread. 3. To keep the queen's council secret. 4. To avoid corruption. 5. To help and strengthen the execution of that which shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lady.

The dissolution of the privy council depends upon the queen's pleasure; and she may, whenever she thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law, also, it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being, at the accession of a new prince, it is enacted, by statute 6 Anne, c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor. [There is but one privy council for Great Britain (stat. 6 Anne c. 6, § 1) which has only the same powers and authorities as the privy council of England had, at the time of the union with Scotland. There is also a privy council in Ireland, as the immediate council of the lord lieutenant; whose chief secretary is, *ex officio*, the keeper of the privy seal, in Ireland.

[All the functions of the privy council are, except when the sovereign is actually present, now discharged by "COMMITTEES" of its members. Of these, the chief are those known by the name of "the cabinet" and "the judicial committee."

[The name of the "cabinet" council, can be traced back to the time of Charles I., as comprising the select confidential advisers of the sovereign, in all matters of either domestic or exterior policy. It exists at the present day; consisting, generally, of fifteen of the chief officers of state, at the head of whom is the first minister of the crown, who selects the rest, and who, together, confidentially discuss and determine the plans of the government; but who are unknown

to the law by any distinct character, or special appointment. It was in the reign of William III. that this distinction between the cabinet, and the privy council at large, and the exclusion of the latter from all business of state, became more fully established. The *responsibility* of the cabinet has been considered a very delicate question; since it has no legal character to which such responsibility can be attached, unless, by the signature, or seal, to a particular instrument, evidence can be secured of such personal liability. It is plain, however, that no difficulty on this score can practically arise; for every member of the cabinet would doubtless be presumed cognisant of, and acquiescent in, any advice given to the crown. Every other member of the privy council, is liable for such acts, only, as can be traced to him, evidenced by signature or sealing; for it has long been the established practice for no privy councillor to attend, unless specially summoned.

[The JUDICIAL COMMITTEE of the privy council, is a permanent tribunal, invested with great authority, and established in the year 1833, by stat. 3 and 4 William IV., c. 41. It now exercises the entire appellate jurisdiction of *The Queen in Council*; besides which, her Majesty may "refer to it, for hearing, or consideration, *any such matter* as her Majesty shall think fit, and to advise her Majesty thereon." The range of its appellate jurisdiction is very extensive; comprising all such civil, ecclesiastical, and maritime matters, both at home and abroad, as had theretofore been exercised by the queen in council. Allegations and proofs are made before the committee, consisting of the most eminent lawyers, chiefly judicial, in the kingdom; who then report to the queen in council, by whom judgment is finally given. There must be at least three members present, exclusive of the Lord President.

[There are also a "Committee of Council on EDUCATION," and another "for the consideration of matters relating to Trade and Foreign Plantations" commonly called "THE

BOARD OF TRADE," each of which is entrusted with great powers and responsibilities.

[What is done by the privy council, when the queen is personally present, are said to be "acts of the queen, in council."]

CHAPTER XXII.

SECRETARIES OF STATE.

[IT is remarkable that, while the statute and common law of this country have been illustrated by some of its most learned writers, the origin, history, and duties of most of the highest officers of the crown, have been comparatively neglected.* Blackstone says of the Secretaries of State, "and the like," that their duties and powers are not investigated by him, "because such officers are not, in that capacity, in any considerable degree the objects of our laws, nor have any large share of magistracy conferred upon them." A functionary, however, so conspicuous and powerful as a secretary of state, is now not to be so summarily dismissed from the notice of a student of constitutional law.

[It seems, according to recent researches by the record commissioners, that the earliest trace of the office of Secretary of State, is to be found in that of "king's secretary" in the year 1253. A second secretary, is first mentioned in the year 1433. A century afterwards, viz., in the month of April 1539, in the third year of the reign of Henry VIII., an important alteration was effected, by dividing the office of "principal secretary" between two persons, who were to bear the same title, hold the same rank, and perform the same duties. This change was probably occasioned by circum-

* Sir H. Nicolas' Preface to vol. vi. of "Proceedings and Orders of the Privy Council."

stances connected with the disgrace of Cromwell. The first instance of there being *three* "principal secretaries" occurred in June 1553; but for a long period subsequently, the number fluctuated between two and three.

[The first instance of the use of the words "secretary *of state*" appears to have been in February 1601, in the 43 Eliz.; when Sir Robert Cecil was styled "our principal secretary of state;" and in the next reign the title became generally adopted, in its modern form, "secretary of state."

[These officers are still constituted, as in ancient times, by the delivery to them of the seal of office; but, in addition to this investiture, they have, in modern times, received a patent under the great seal.* Whatever their number, they constitute *but one officer*, co-ordinate and equal, in rank and authority. Each is competent to perform any part of the duties of the secretary of state; the ordinary division between them, being matter of mere arrangement, for the convenient despatch of business.

[From an early period, down to the year 1782, while there were only two secretaries, the two departments were denominated "northern" and "southern" respectively, referring to corresponding foreign provinces. In that year, however, a new distribution of the functions of the office was made, into "home" and "foreign;" the former attending to colonial affairs, till the revival of the third secretary,—that for war, in 1794,—to whom the administration of colonial affairs was committed in the year 1801.† Thus matters continued till 1854, when the colonial and war departments were separated, and a fourth secretary of state appointed by her majesty, entitled "the secretary for war."

[When the origin and history of the office of secretary of state are considered, it is not surprising that the right of

* Sir H. Nicolas' Preface to vol. vi. of "Proceedings and Orders of the Privy Council."

† See State Papers, vol. i., pref. xii.

such an officer to act in a magisterial capacity, as stated by Blackstone, in cases involving the liberty of the subject, should have been doubted, and the determination of courts of law in favour of such a right, gravely questioned. It is clear that the powers of this great officer are derived from neither the common, nor statute law; and, though, from analogy, the right of committal was held by chief justice Holt to be incidental to the office, there would have been some difficulty in discovering precedents for the decision.]

CHAPTER XXIII.

THE QUEEN'S DUTIES.—THE CORONATION OATH.

[1 Bla. Com., 233—236.]

In consideration of the duties incumbent on the queen, by our constitution, her dignity and prerogative are established by the law of the land: it being a maxim in the law, that protection, and subjection, are reciprocal. And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that King James had broken "the *original contract*" between king and people. Whatever doubts might be formerly raised, by weak and scrupulous minds, about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who has reigned since the year 1688. [The principal duty of the queen, is to govern her people according to law. "The king himself," says Bracton, who wrote under Henry III., "ought not to be under man, but under God and the law; because the law maketh the king. Let the king, then, ascribe to the law what the law ascribeth to him; to wit, domination and power: for there is no king, where will ruleth, and not the law."] To obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 and 13 W. III. c. 2, "that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the

throne of this realm, ought to administer the government of the same, according to the said laws: and all their officers and ministers ought to serve them respectively, according to the same; and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly."

[OF THE "ORIGINAL, OR SOCIAL, CONTRACT."

[But first it may be proper to explain the sense in which the words "the original contract" are understood. Great controversy has existed, among political and moral writers on this subject, as to its nature—whether it be a reality, or a fiction—and the true consequences deducible from it. Without entering into these endless and unprofitable discussions, the student may regard the term "original contract" as signifying, that there are cases in which the subject's duty of obedience is annulled, and resistance to the governor becomes justifiable; but the expression "contract" is thus far certainly unfortunate, that in such a case, it makes one party to that contract the judge in his own case, against the other party; the one as to the existence of *tyranny*, the other of *rebellion*. The expression must, in truth, be used as a mere formula, expressing the existence of a justifying necessity of action; yet involving the existence of a wide and complex collection of arrangements and provisions, for defining and securing to men their rights. If some one article or clause be broken by any party, the whole contract is not thereby annulled; it is not even disturbed, as to the other parties, who must judge whether the other has broken the contract, and visit him, in that case, with penalties already provided by the constitution; or if none such exist, they must act according to the exigency of the occasion. In the deposition of James II., though he was deposed as having broken the original contract

between the king and the people, still that contract which gave him, the houses of parliament, and the magistrates of the land, their authority, was looked upon as undisturbed, and all parties, except the king, retained and exercised the powers of their station.*—In the United States of America, there exists a formal written contract, or compact, called "The Constitution." That of England is to be collected from divers acts of parliament, and the common law of the land. In Germany, the doctrine of the social contract would appear to be generally regarded as the very basis of the science of politics.]

The terms of the original contract between king and people I apprehend to be now couched in the Coronation Oath; which, by the statute 1 W. & M., stat. 1, c. 6, is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown.

[That Oath is as follows, and was thus administered,† on the Coronation of Queen Victoria:—

["The Sermon being ended, and Her Majesty, having on Monday the 20th day of November, 1837, in the presence of the Two Houses of Parliament, made and signed the Declaration,‡ the Archbishop goeth to the Queen, and standing before Her, saith to the Queen,

[Madam, Is your Majesty willing to take the Oath?

[And the Queen answering,

[I am willing.

* See the whole question very ably stated in Dr. Whewell's "Elements of Morality." Book v., cc. 4, 5, 6.

† The "Form and Order of the Coronation Service," published by the Queen's Printers, 1838.

‡ *i.e.* against the doctrines of the Roman Catholic Church, prescribed by the 30 Charles II., stat. 2, as required by both the Bill of Rights, and the Act of Settlement.

[The Archbishop ministereth these Questions; and the Queen, having a Copy of the printed Form and Order of the Coronation Service in Her hands, answers each question severally, as follows.

[Archbishop. Will you solemnly promise and swear, to govern the People of this United Kingdom of *Great Britain* and *Ireland*, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective Laws and Customs of the same?

[*Queen.* I solemnly promise so to do.

[*Archbishop.* Will You, to Your Power, cause Law and Justice, in Mercy, to be executed in all your Judgements?

[*Queen.* I will.

[*Archbishop.* Will you, to the utmost of Your Power, maintain, the Laws of God, the true Profession of the Gospel, and the Protestant Reformed Religion established by Law? And will You maintain and preserve inviolably the Settlement of the United Church of *England* and *Ireland*, and the Doctrine, Worship, Discipline, and Government thereof, as by Law established within *England* and *Ireland*, and the Territories thereunto belonging? And will you preserve unto the Bishops and Clergy of *England* and *Ireland*, and to the Churches there committed to their Charge, all such Rights and Privileges, as by Law do, or shall appertain to Them, or any of Them?

[*Queen.* All this I promise to do.

[Then the Queen, arising out of Her Chair, attended by Her Supporters, and assisted by the Lord Great Chamberlain, the Sword of State being carried before Her, shall go to the Altar, and there make Her Solemn Oath in the sight of all the People, to observe the Premises: Laying Her right Hand upon the Holy Gospel in the Great Bible, which was before carried in the Procession, and is now brought from the Altar by the Archbishop, and tendered to Her as She kneels upon the Steps, saying these Words:

The Bible to be brought.

[The things which I have here before promised, I will perform and keep. So help Me God.

[And a Silver standish.

Then the Queen kisseth the Book, and signeth the Oath."]

CHAPTER XXIV.

THE ROYAL PREROGATIVE.

[1 Bla. Com.; 237—279.]

ONE of the principal bulwarks of civil liberty, or, in other words, of the British constitution, is the *limitation of the queen's prerogative*, by bounds so certain and notorious, that it is impossible she should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly,* subsists between the sovereign and the subject.

By the word "prerogative," we understand, that SPECIAL PRE-EMINENCE, WHICH THE QUEEN HAS, OVER AND ABOVE ALL OTHER PERSONS, AND OUT OF THE ORDINARY COURSE OF THE COMMON LAW, IN RIGHT OF HER REGAL DIGNITY.

The enormous weight of prerogative, if left to itself, as in arbitrary governments it is, spreads havoc and destruction among all the inferior movements; but, when balanced and regulated, as with us, by its proper counterpoise, timely and judiciously applied, its operations are equable and certain; it invigorates the whole machine, and enables every part to answer the end of its construction.

Under every monarchical government, it is necessary to

* Ante, p. 226.

distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from, and superior to, those of any other individual in the nation. The law therefore ascribes to the sovereign, in her high political character, not only large powers, and emoluments, which form her prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to pay her that profound deference and respect, which may enable her with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we shall now proceed to examine.

I. And, first, the law ascribes to the queen the attribute of SOVEREIGNTY, or pre-eminence. Her realm is declared to be an empire, and her crown to be imperial, by many acts of parliament, particularly the statutes 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 28; which at the same time declare the king to be the supreme head of the realm, in matters both civil and ecclesiastical, and, of consequence, inferior to no man upon earth, dependent on no man, accountable to no man. Hence it is, that no suit or action can be brought against the queen, in even civil matters, because no court can have jurisdiction over her. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is, likewise, that, by law, the person of the sovereign is sacred, even though the measures pursued in his reign, be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and

if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, by either private injuries or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to *private injuries*: If any person have, in point of property, a just demand upon the queen, he must petition her in her court of chancery, where her chancellor will administer right, as a matter of grace, though not upon compulsion. [The prayer of this petition, which is really in the nature of an action against the sovereign for the recovery of debts, chattels real, or personal, and unliquidated damages, is grantable *ex debito justitiæ*. It may be addressed to the queen in either parliament, chancery, or any other court.] And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf, "so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it, though no wise prince will ever refuse to stand to a lawful contract: and if the prince give the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws; for the end of such action is not to compel the prince to observe the contract, but to persuade him." And, as to personal wrongs; it is well observed by Mr. Locke, "the harm which the sovereign can do in his own person, not being likely to happen often, nor to extend itself far, nor being able, by his single strength, to subvert the laws, nor oppress the body of the people, should any prince have so much weakness and ill nature as to endeavour to do it—the inconveniency, therefore, of some particular

mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate, being thus set out of the reach of danger."

Next, as to cases of ordinary *public oppression*, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown, in contradiction to the laws of the land. But it is, at the same time, a maxim in those laws, that the queen herself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

The supposition of law is, that neither the queen nor either house of parliament, collectively taken, is capable of doing any wrong; since, in such cases, the law feels itself incapable of furnishing any adequate remedy. For which reason, all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies, upon new emergencies.

Indeed, it is found, by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity: nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a

very remarkable case, which has been already under our notice,* wherein nature and reason prevailed. When king James II. invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown.' And so far as this precedent leads, and no farther, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution, by breaking the original contract between king and people,—should, by the advice of jesuits and other wicked persons, violate the fundamental laws, and withdraw himself out of the kingdom; we are now authorised to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients, would amount to such a situation: for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent, though latent, powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

II. Besides the attribute of sovereignty, the law also ascribes to the queen, *in her political capacity*, absolute perfection. THE QUEEN CAN DO NO WRONG. This ancient and fundamental maxim is not to be understood as if every thing transacted by the government, was of course just and lawful: but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the queen, nor is she answerable for it personally to her people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and

therefore compounded, constitution. And, secondly, it means, that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

In the sovereign, also, can be no stain or corruption of blood: for if the heir to the crown were attainted of treason, or felony, and afterwards the crown should descend to him, this would purge the attainder, *ipso facto*. And therefore when Henry VII., who as earl of Richmond, stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon in his history of that prince informs us, it was agreed that the assumption of the crown had at once purged all attainders.—Neither can the queen, in judgment of law, as queen, ever be a minor, or under age; and therefore her royal grants, and assents to acts of parliament, are good, though she have not in her natural capacity attained the legal age of twenty-one. It has indeed been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian or regent*, for a limited time: but the very necessity of such extraordinary provision, is sufficient to demonstrate the truth of that maxim of common law, that in the queen is no minority; and therefore she hath no legal guardian.

III. A third attribute of the queen's majesty is her perpetuity. The law ascribes to her, in her political capacity, an absolute immortality. THE QUEEN NEVER DIES. Henry, George, Elizabeth or Anne, may die; but "THE KING, or QUEEN" survives them all. For immediately upon the decease of the reigning sovereign in her natural capacity, her imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in her heir; who is, *eo instanti*, king [or queen] to all intents and purposes.

* The regency of this kingdom, in case of minority upon the demise of her present Most Gracious Majesty (whom God long preserve) is provided for by statute 3 & 4 Vict., c. 52.—Ante, p. 135.

We are next to consider those branches of the royal prerogative, which invest thus our sovereign lady, in her queenly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand, by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited, and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The queen of England is not only the chief, but, properly, the sole, magistrate of the nation; all others acting by commission from, and in due subordination to, her; in like manner as, upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentred in the new emperor: so that as Gravina expresses it, *in ejus unius personâ, veteris reipublicæ vis atque majestas per cumulatas magistratuum potestates, exprimebatur*.

In the exertion of those prerogatives, which the law has given her, the queen is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call her advisers to a just and severe account. For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus a queen may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

With regard to foreign concerns, the queen is the delegate

or representative of her people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the sovereign, therefore, as in a centre, all the rays of the people are united, and form by that union a consistency, splendour, and power, that make her feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of a whole nation: what is done without the sovereign's concurrence, is the act of only private men.'

The queen, therefore, considered as the representative of her people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. The rights, the powers, the duties, and the privileges of ambassadors, are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws, is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence, ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offend, or make an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or avow himself the accomplice of his crimes. It is also the queen's prerogative to make *treaties*, *leagues*, and *alliances*, with foreign states and princes. It is, by the law of nations, essential to the goodness of a

league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England, the sovereign power, *quoad hoc*, is vested in the person of the sovereign. Whatever contracts, therefore, she engages in, no other power in the kingdom can legally delay, resist or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution, as was hinted before, has here interposed a check, by the means of parliamentary impeachment, for the punishment of any such ministers, as, from criminal motives, advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

Upon the same principle, the queen has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power; and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is, in general, sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative. [Another check consists in the power of parliament to withhold the supplies, which are the sinews of war.]

Upon exactly the same reason stands the prerogative of granting *safe-conducts*, without which, by the law of nations, no member of one society has a right to intrude into another. And, therefore, Puffendorf justly resolves, that it is left in the power of all states to take such measures about the admission of strangers, as they think convenient; those

being ever excepted, who are driven on the coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the queen's protection; though liable to be sent home, whenever she sees occasion. [But no subject of a nation at war with us, can, by the law of nations, come into the realm, or travel on the high seas, or send his goods or merchandise from one place to another, without danger of being seized, by our subjects, unless he have letters of safe conduct, or a passport under the queen's sign manual, or a licence from her ambassador abroad.

[Aliens, subjects of a *friendly* country, may as freely reside here, as enter, or leave,—subject to a power of removal by a secretary of state, if deemed expedient, under the authority of an act temporarily passed, for that purpose. They must, however, be registered on their arrival, and give all the information concerning themselves and their movements, required by statute 6 & 7 Will. 4, c. 11.]

These are the principal prerogatives of the queen, respecting this nation's intercourse with foreign nations; in all of which she is considered as the delegate or representative of her people. But in domestic affairs she is considered in a great variety of characters, and thence arises an abundant number of other prerogatives.

I. First, she is, as we have seen, *a constituent part of the supreme legislative power;* and, as such, has the prerogative of rejecting such provisions in parliament, as she may judge improper to be passed.

II. The sovereign is considered, in the next place, as *the first in military command, within the kingdom.* The great end of society, is to protect the weakness of individuals, by the united strength of the community: and the principal use of

government is to direct that united strength, in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any, for this purpose; it follows, therefore, from the very end of its institution, that in a monarchy, the military power must be trusted in the hands of the prince.

In this capacity, therefore, of general of the kingdom, the sovereign has the sole power of raising and regulating fleets and armies.

III. Another capacity in which the sovereign is considered in domestic affairs, is, *as the fountain of justice, and general conservator of the peace of the kingdom.* By the *fountain* of justice, the law does not mean the author or original, but only the distributor. Justice is not derived from the sovereign as from his free gift; but he is the steward of the public, to dispense it to whom it is DUE. [*Ad hoc, autem creatus est et electus; ut justitiam faciat universis.*]* He is not the spring, but the reservoir; whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but, as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the sovereign, or his substitutes. The queen, therefore, has alone the right of erecting courts of judicature [unless where they are erected by act of parliament]: for though the constitution of the kingdom has entrusted her with the whole executive power of the laws, it is impossible, as well as improper, that she should personally carry into execution this great and extensive trust: it is, consequently, necessary that

* Bracton.

courts should be erected, to assist her in executing this power; and equally necessary, that, if erected, they should be erected by her authority. And hence it is, that all jurisdictions of courts, are either mediately or immediately derived from the crown; their proceedings run generally in the queen's name; they pass under her seal; and are executed by her officers.

It is probable, and almost certain, that in very early times, before our constitution had arrived at its full perfection, our kings, in person, often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter, but by act of parliament. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2. that their commission shall be made, not as formerly, *durante bene placito*, but *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them, on the address of both houses of parliament. And now, by the noble improvements of that law, in the statute of Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices, during their good behaviour, notwithstanding any demise of the crown, which was formerly held immediately to vacate their seats; and their full salaries are absolutely secured to them, during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the

crown." [An eminent American jurist * has remarked, that tenure of office during good behaviour—i.e. for life—is nevertheless an inadequate guarantee for judicial independence, so long as the legislature is entrusted with complete power over the jurisdiction and salaries of the judges. If, however, this be so, it is an evil almost inseparable from the institution, which in this kingdom has long afforded unmingled satisfaction.]

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the sovereign personally sat in judgment; because, in regard to these, she appears in another capacity, that of prosecutor. All offences are either against the queen's peace, or her crown and dignity: and are so laid in every indictment. For though, in their consequences, they generally seem, except in the case of treason, and a very few others, to be rather offences against the kingdom, than the queen; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against her, to whom they are so delegated by the public. She is, therefore, the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. Thence also arises another branch of the prerogative, that of pardoning offences; for it is reasonable, that she only who is injured, should have the power of forgiving.—Prosecutions and pardons are here mentioned in this cursory manner, only to show the constitutional grounds of this power of the crown, and how regularly connected are all the links in this vast chain of prerogative.

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main

* Mr. Justice Story.

preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice, be in some degree separated from both the legislative and the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative.

A consequence of this prerogative is, the legal *ubiquity* of the sovereign. Her majesty, in the eye of the law, is always present in all her courts, though she cannot personally distribute justice. Her judges are the mirror by which the queen's image is reflected. *It is the regal office, and not the royal person, that is always present in the court,* always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the queen can never be nonsuited; for a nonsuit is the desertion of the suit or action, by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the queen is not said to appear by attorney, as her subjects do, for, in contemplation of law, she is always present in court.

[From this prerogative also, of being the fountain of justice, may be deduced that of issuing proclamations, vested in the queen alone: which have a binding force, when grounded upon and enforcing execution of the laws of the realm.]

IV. *The queen is likewise the fountain of all* honour, of office, and of privilege:* and this, in a different sense from that wherein she is styled the fountain of justice; for here she is really the parent of them.—It is impossible that

* Comyns' Digest, Dignity A.

government can be maintained, without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation, and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the queen herself who employs them. It has therefore intrusted her with the sole power of conferring dignities and honours, in confidence that she will bestow them upon none but such as deserve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight. [As honours and offices are in their nature convertible and synonymous, so each are in the disposal of the sovereign: and as she may create new titles, she may create new offices, and grant place or precedence, but subject to that already assigned by the statute law.

[As the queen is the fountain of all honour and dignity in this kingdom, if a foreign king should create any of her subjects noble, such subject shall not be allowed his dignity, by the law, here:* nor can such subject receive a pension, or any thing else, which may create an undue influence in favour of the foreign power, without the queen's licence. Though friendly now, the foreign power may become an enemy.]

V. As money is the medium of commerce, it is the queen's prerogative, as the arbiter of domestic commerce, to give it authority, or make it current.

The coining of money is in all states the act of the sovereign power; and the stamping thereof is the unquestionable prerogative of the crown.

* *Calvin's* case, 7 Co. 16 a.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the queen; and if any unusual pieces are coined, that value must be ascertained by proclamation. The queen may also, by her proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments, by comparison with the standard of our own coin. She may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current.

The queen is, *lastly*, considered by the laws of England as *the head and supreme governor of the national church*. This, however, will form the subject of a separate chapter.*

* Post, "The United Church of England and Ireland."

CHAPTER XXV.

ROYAL REVENUE.

[KING GEORGE THE THIRD, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of, as might best conduce to the utility and satisfaction of the public: and having graciously accepted the limited sum of 800,000*l.* per annum, for the support of his civil list, that is to say, the whole of the king's revenues in his own distinct capacity; the hereditary and other revenues were carried into, and made part of, the aggregate fund, which was charged with the payment of the whole annuity to the crown.] Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more, and are better collected, than heretofore; and the public is still a gainer of near 100,000*l.* per annum, by this disinterested conduct of his majesty.

[The justice of this observation of Blackstone, will appear in reference to a parliamentary return, printed in the year 1832, giving a minute account "of his majesty's hereditary and temporary revenues, and the amount of annuity received by his majesty, of monies granted by parliament for the discharge of the civil list debt," from the period mentioned by Blackstone; viz., the 25th of Oct., 1760, to the 26th of June, 1830. From this interesting and important docu-

ment it is seen, that the amount of the hereditary and temporary revenues during that period, was nearly *ninety-five millions sterling* (94,871,427*l.* 19*s.* 9¾*d.*); while the sums received by the sovereign in lieu of them, amounted to rather less than *sixty-six millions sterling* (65,823,438*l.* 7*s.* 11½*d.*); leaving a balance of no less a sum than nearly *thirty millions sterling* (29,047,989*l.* 11*s.* 10½*d.*), in favour of the public!

[The example of king Geo. III. has been followed by his successors, Geo. IV. (stat. 1 Geo. IV. c. 1), William IV. (stat. 1 Will. IV. c. 25), and queen Victoria (stat. 1 & 2 Vict. c. 2), all of whom, on their respective accessions, caused their hereditary revenues to be unreservedly carried to, and made part of, the consolidated fund. New arrangements have been made, with reference to the mode of providing for the support of the royal household, and of the honour and dignity of the crown—the principal of which consisted, in judiciously separating the personal and domestic expenditure of the sovereign, from that which belonged properly to the civil government of the kingdom, and which is not charged directly upon the consolidated fund. The net yearly revenue of her present majesty, is fixed at the sum of 385,000*l.*, and is arranged as follows, according to the schedule annexed to stat. 1 & 2 Vict. c. 2: *First Class*, for her majesty's privy purse, 60,000*l.*; *Second Class*, salaries of her majesty's household and retired allowances, 131,260*l.*; *Third Class*, expences of her majesty's household, 172,500; *Fourth Class*, royal bounty, alms, and special services, 13,200*l.*; *Fifth Class*, pensions to the extent of 1200*l.*, per annum, ——*l.*; *Sixth Class*, unappropriated monies, 8040*l.*—Total, 385,000*l.*

[Though the above sum of 385,000*l.*, is by the act (§ 14), specially freed from all charges and deductions whatsoever, her present majesty, on the imposition of the income tax, by stat. 5 & 6 Vict. c. 35, was graciously pleased to signify to parliament, that she wished her own income to be subject to the

tax imposed on that of her subjects.—It may be observed, that the first item of 60,000*l.* consists almost wholly of donations to distressed individuals, and grants to charitable institutions;—that a list of all pensions granted under class five, must be laid before parliament, yearly (§ 6); and that whenever the total charge on the other classes exceeds 400,000*l.*, full particulars of the excess must also be laid before parliament (§ 10); and that the act is to continue in force for six months after her majesty's decease, unless her heir or successor shall sooner signify to parliament his or her will and pleasure, to resume the possession of the hereditary revenues thereby surrendered by her majesty, (§ 17).]

CHAPTER XXVI.

SUBORDINATE CIVIL OFFICERS—SHERIFFS, CORONERS, JUSTICES OF THE PEACE, CONSTABLES.

[1 Bla. Com., 338—357.]

I. THE sheriff is an officer of great antiquity in this kingdom; his name being derived from two Saxon words, ꞅcɪꞃeᵹeꞃeꝼa the "*reeve*," bailiff, or officer of the "*shirè*," [shire-reeve, or sheriff]. He is called, in Latin, *vice-comes*, as being the deputy of the earl, or *comes;* to whom the custody of the shire is said to have been committed, at the first division of this kingdom into counties. But the earls, in process of time, by reason of their high employments, and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden: reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the queen's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the queen, by her letters patent, committing *custodiam comitatûs* to the sheriff, and him alone. [The sheriff was originally chosen by the inhabitants of the county; but the extortions and oppressions committed by the sheriffs, in those days, led to the appointment of that officer being vested in the crown, on the nomination of the judges, and great officers of state; who proposed three persons for each county, of whom the

king appointed one, who was to serve the office. This excellent system has been in force ever since the statute of 12 Rich. II. c. 2. [A.D. 1388.] The city of London claims to have a prescriptive right to elect *two* sheriffs; and king John, and Henry I. granted to the citizens the shrievalty of the county of *Middlesex*. The two sheriffs for London act as the sole sheriff of Middlesex. It is of importance to have the sheriff appointed according to law, when we consider his power and duty; which are] as a judge, as the keeper of the queen's peace, as a ministerial officer of the superior courts of justice, or as the queen's bailiff.

(i.) In his judicial capacity, he is to preside [not personally, but by his undersheriff,] over the county court held within his county; [but this is a court quite distinct from the newly established county courts for the recovery of small debts;] and he has also a judicial power in divers other civil cases. He is likewise to superintend the elections of coroners, and verderors, and to return such as he shall determine to be duly elected.

(ii.) As the KEEPER OF THE QUEEN'S PEACE, by both common law and special commission, he is the first man in the county, and, during his office, superior in rank to any nobleman therein. He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may bind any one in recognizance to keep the queen's peace. He may, and is bound *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the queen's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend, upon warning, under pain of fine and imprisonment. [The reason of the sheriff's being

armed with this power, was to meet the exigencies of ancient times, when great men had castles, fortresses, and liberties; whereby they resisted the execution of the king's writs. The *posse comitatûs* is no longer so organized as to be practicably available; and the occasion for it can rarely arise, owing to our systematic police, and military arrangements.] But though the sheriff is thus the principal conservator of the peace in his county, yet, by the express directions of the great charter, he, together with the constable, coroner, and certain other officers of the queen, is forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as ordinary justice of the peace, during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justices; [nor be a member of parliament for his county, during his shrievalty.]

(iii.) In his MINISTERIAL capacity, the sheriff [has to superintend the elections of knights of the shire, and] is bound to execute all process issuing from the queen's superior courts of justice. [In actions in the superior courts, if a judge allow a defendant to be arrested at the commencement of the action, to prevent his absconding, the sheriff must arrest him and take bail;] when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution, and is liable, in all these cases, to an action for negligence or misconduct. In criminal matters, he also arrests and imprisons; he returns the jury; he has the custody of the delinquent; and he executes the sentence of the court, though it extend to death itself.

(iv.) As the QUEEN'S BAILIFF, it is his business to preserve the rights of the queen within his "*bailiwick;*" for so his

county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as that of England into counties. He must seize to the queen's use all lands devolved to the crown, by attainder or escheat; levy all fines and forfeitures; seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must always collect the queen's rents within the bailiwick, if commanded by process from the exchequer.

To execute these various offices, the sheriff has under him many inferior officers; a deputy, or under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*. The under-sheriff (an attorney) usually performs all the duties of the office, except where the personal presence of the sheriff is necessary.

II. The CORONER's is also a very ancient office at the common law. He is called coroner, *coronator*, because he has principally to do with pleas of the crown, or such wherein the queen is more immediately concerned. And in this light the lord chief justice of the queen's bench is the principal coroner in the kingdom, and may, if he please, exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer. This officer is of equal antiquity with the sheriff; and was ordained, together with him, to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders, in the county court; as by the policy of our ancient laws, the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people. And it was enacted by the statute of Westm. I., that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III., of a man being removed from this office, because he was only a

merchant. But it seems it is now sufficient if a man has lands enough to be made a knight, that is, to the amount of 20*l.* a year, whether he be really knighted or not. [Coroners may, by stat. 7 & 8 Vict. c. 92, be appointed for districts within counties, (if the county shall have been divided as therein provided,) and elected by the freeholders resident within such districts; in boroughs with a separate court of quarter sessions, the coroner is, by stat. 5 & 6 Wm. 4, c. 76, §§ 62—64, appointed by the town council: the coroner for the county at large, acting in all other boroughs.]

The coroner is chosen for life; but may be removed, by either being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the queen's writ *de coronatore exonerando,* for a cause to be therein assigned: as that he is engaged in other business, is incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part in it. And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal. [Both borough and county coroners may, by writing under their hand and seal, appoint *deputies*, approved by the lord chancellor, to act for them, in holding inquests, during their illness, or absence from lawful or reasonable cause.]

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial: but principally judicial. This is, in a great measure, ascertained by statute 4 Edw. I. *de officio coronatoris;* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. [The court is a court of record; there must be at least twelve jurymen; and they must be sworn, and charged to inquire how the party came by his or her death; and to this duty the coroner ought to confine their attention, and their verdict.] And this must be "*super visum corporis,*" for, if the body be not found, the coroner cannot sit [except by virtue of a special commission. By statute 6 & 7 Vict. c. 12, that

coroner shall hold the inquest, within whose jurisdiction the body shall be lying dead, though the cause of death may not have arisen there. The coroner may also secure his being attended by competent medical practitioners, and may order a *post mortem* examination. Twelve of the jurymen must concur, in finding an inquisition; which cannot, moreover, be quashed for mere technical defects.] If any be found guilty, by this inquest, of murder or other homicide, the coroner is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby. [The coroner had also, till the year 1846, to inquire whether any '*deodand*' was due to the crown: *i. e.* what personal chattel was the immediate and accidental cause of death; which, in ancient times, was held forfeited to the crown, to be applied to pious uses, and distributed in alms by the high almoner. This gave rise to great subtleties in litigation, which drew attention to the absurdity of the thing itself; whereupon it was abolished, in the year above-mentioned, by statute 9 & 10 Vict. c. 62.] The coroner must also certify the whole of his inquisition, under his own seal and the seals of his jurors, together with the evidence thereon, to the court of queen's bench, or the next assizes.—Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (says the old statute of Edw. I.), where one liveth riotously, haunting taverns, and hath done so of long time;" whereupon he might be attached, and held to bail, upon this suspicion only. [It has been doubted in a recent case, by a great authority,* whether the coroner can be properly called a judicial officer, or his court a court

* Lord Abinger, *Jewison* v. *Dyson*, 9 Mee. & W. 585—6.

of record; but it had been previously held expressly by Lord Tenterden,* that "the court of the coroner is a court of record, of which the coroner is the judge:" and it was there decided, moreover, that it is for the coroner alone to determine whether he will conduct the inquiry openly or privately, so as best to further the ends of justice, which may be utterly frustrated by premature publicity.]

The ministerial office of the coroner is only as the sheriff's substitute, in executing process. For when just exception can be taken to the sheriff, for suspicion of partiality,—as that he is interested in the suit, or of kindred to either plaintiff or defendant,—the process must then be awarded to the coroner, instead of the sheriff, for execution of the queen's writs.

III. The next species of subordinate magistrates, whom I am to consider, are JUSTICES OF THE PEACE; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law has ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law, for the maintenance of the public peace. Of these, some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes*, or *conservatores, pacis*. Those that were so *virtute officii*, still continue; but the latter sort are superseded by the modern justices.

The queen's majesty is, by her office and dignity royal, the principal conservator of the peace within all her dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called "the queen's peace." The lord chancellor or keeper, the lord treasurer, the lord high steward of England,

* *Garnett* v. *Ferrand*, 6 Barn & C. 625.

the lord mareschal, the lord high constable of England (when any such offices are in being), and all the justices of the court of queen's bench, by virtue of their offices, and the master of the rolls by prescription, are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it; the other judges being such only in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both may take a recognizance, or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them, until they find sureties for their keeping it.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription; or were bound to exercise it by the tenure of their lands; or, lastly, were chosen by the freeholders, in full county court, before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatûs sui, in custodes pacis.*" But early in the reign of Edward III. it was ordained in parliament, that for the better maintaining and keeping of the peace in every county, good men and lawful, who were no maintainers of evil, or barretors in the country, should be "assigned" to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king; this "assignment" being construed to be, by the king's commission. But still they were called only conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of Justices.

These justices are appointed by the queen's special commission, under the great seal, the form of which was settled by all the judges, A. D. 1590. This appoints them all,

jointly and severally, to keep the peace, and any two or more of them to inquire of, and determine, felonies and misdemeanours; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "QUORUM *aliquem vestrum A. B. C. D. &c. unum esse, volumus;*" whence the persons so named are usually called "justices of the *quorum.*" And formerly, it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now, the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except, perhaps only some one inconsiderable person, for the sake of propriety; and no exception is now allowable, for not expressing in the form of warrants, &c. that the justice who issued them is of the *quorum.* When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem,* from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths* to him; which done, he is at liberty to act [but wholly gratuitously; wherefore he is commonly called an "*unpaid* justice or magistrate," in contradistinction to a "stipendiary" or police magistrate.] Touching the number of these magistrates, it is indefinite, and much greater, from various causes, than in former times. [By the municipal corporation act the mayor and recorder of a borough are, *ex officio,* justices of the peace for such borough, while in such offices; and the crown may appoint any number of resident justices which it may think fit, as well as a salaried justice, provided the town council first vote a salary for such officer.] It is enacted by statute 5 Geo. II. c. 18, that every justice, except as is therein excepted, shall have 100*l.* per annum,

* i.e. An oath of office of qualification as to estate, and of allegiance, supremacy, and abjuration.

clear of all deductions; and if he act without such qualification, he shall forfeit 100*l.* [Also it is provided by the act 6 & 7 Vict. c. 73, § 33, that no practising attorney or solicitor, shall be capable of acting as a justice of the peace.]

As the office of these justices is conferred by the queen, so it subsists only during her pleasure; and is determinable 1. By the demise of the crown: that is, in six months after. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh; nor, by reason of any new commission to take the oaths more than once in the same reign. 2. By express writ under the great seal, discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein: for two commissions cannot subsist at once. 5. By accession of the office of sheriff, which disqualifies during the year of shrievalty. Notwithstanding a new title of dignity, the justice on whom it is conferred, still continues a justice.

The power, office, and duty, of a justice of the peace, depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common-law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals; these latter duties being regulated by certain recent statutes. It also empowers any two or more to hear and determine all felonies, and other offences; which is the ground of their criminal jurisdiction at sessions. And as to the powers given to one, two, or more justices, by the several statutes,

which from time to time have heaped upon them such an infinite variety of business that few care to undertake, and fewer understand the office; they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, who without any sinister views of his own, will engage in this troublesome service.

["The unpaid justices of the peace," said the court of Queen's Bench,* on a late occasion, "are a class of persons to whom the country is under as great obligation, as this, or any other nation is, or ever was, to any members of its community."] And therefore, if a well-meaning justice make any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office. [In particular, by statute 11 & 12 Vict. c. 44, entitled "An Act to protect Justices of the Peace from vexatious actions, for acts done in the execution of their office"—which came into operation on the 2nd October 1848,—many salutary provisions are enacted for that purpose. A calendar month's notice of action must be given, though the justice act maliciously, and without reasonable and probable cause: and it is for the judge, not the jury, to decide whether notice of action be necessary.† The action must be brought within six calendar months next after the act complained of; none such can be brought against a justice, in respect of the exercise of any *discretionary* power; —if he refuse to act in any given case, the court of Queen's Bench may, by rule, founded on an affidavit of the facts, order him to act, and then no action will lie against him for acting;—he cannot be sued for an act *within* his jurisdiction, unless it were both malicious, and without reasonable and probable cause—but if it be proved such, he is liable to full costs of suit. He is still liable, as before, for

* *Rex* v. *Borrim*, 3 Barn and Ald. 433, quoted in 2 Steph. Comm. p. 629.

† Kirby *v.* Simpson, 23 Law J. N. S. Mag. Cas. 165.

an act done without, or in excess of his, jurisdiction, without reference to the character of the act, as being malicious, and without reasonable and probable cause: but before such an action is brought, the conviction, or order, under which the act was done, must have first been quashed by the court of Queen's Bench. Nor are justices liable to criminal proceedings, unless for corrupt or malicious conduct in the exercise of their discretion.]

I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction.

IV. Fourthly, then, of the CONSTABLE. [It is beyond the scope of this work to enter into details concerning this ancient class of humble but useful functionaries, or distinguish between the respective duties of high and petty constables. Reference with that view, may be made to the recent statutes of 5 & 6 Vict. c. 109, and 13 & 14 Vict. c. 20, for the "appointment and payment of parish constables." The appointment, rights and duties, of *special* constables, also, depend chiefly on recent statutes, which need not be here specified.

[The peace of the kingdom is now preserved, especially in towns, by well-organised and efficient bodies of police; which originated in the metropolis, in the year 1829, under the auspices of sir Robert Peel (stat. 10 Geo. 4, c. 44), and has been ever since gradually and rapidly extending throughout the three kingdoms.]

CHAPTER XXVII.

THE PEOPLE.

[1 Bla. Com. 366—375.]

THE first and most obvious division of the people, is into ALIENS, and NATURAL-BORN SUBJECTS. The latter are those born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the queen: and aliens, such as are born out of it. Allegiance is the tie or *ligamen*, which binds the subject to the sovereign, in return for that protection which he affords the subject. The thing itself, or substantial part of it, is founded in reason, and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feodal system, every owner of lands, as will be briefly shown hereafter, held them in subjection to some superior, or lord, from whom, or whose ancestors, the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory granted to him, and, on the other hand, that in return the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal, was called his *fidelitas* or *fealty;* and an oath of fealty was required, by the feodal

law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance; except that in the usual oath of fealty, there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of *fealty*, but the oath of *allegiance;* and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines, fidelitatem fecit.*" But with us in England, it becoming a settled principle of tenure, that all lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term *allegiance* was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king *and his heirs*, and truth and faith to bear, of life and limb, and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which Sir Matthew Hale makes this remark: that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But at the revolution, the terms of this oath being thought perhaps to savour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject promising only "that he will be faithful and bear true allegiance to the king," without mentioning "*his heirs,*"

or specifying in the least *wherein that allegiance consists.*

[The following is the existing OATH OF ALLEGIANCE.—(Stat. 1 Geo. I. stat. 2, § 13.)

["I, A. B., do sincerely promise and swear, that I will be faithful, and bear true allegiance to Her Majesty Queen Victoria. So help me God."

[The following is the OATH OF SUPREMACY.—(Statute 1 Geo. I. stat. 2, c. 13.)

["I, A. B., do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated, or deprived by the Pope, or any authority of the see of Rome, may be deposed or murthered by their subjects, or any other whatsoever.

["And I do declare that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God."

[The following is the oath of ABJURATION, which it was attempted in the session of 1856 to modify.—(3 Geo. I. c. 53).

["I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, in my conscience, before God, and the world, that our sovereign lady queen Victoria is lawful and rightful queen of this realm, and all other her Majesty's dominions and countries thereunto belonging.

["And I do solemnly and sincerely declare, that I do believe, in my conscience, that not any of the descendants of the person who pretended to be Prince of Wales, during the life of the late king James the second, and since his decease pretended to be, and took upon himself the style and title of king of England, by the name of James the third, or of Scotland by the name of James the eighth, or the style and title of king of Great Britain, hath any right or title whatsoever to the crown of this realm, or any other the dominions

thereunto belonging: and I do renounce, refuse, and abjure, any allegiance or obedience to any of them.

["And I do swear that I will bear faith and true allegiance to her majesty queen Victoria, and her will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever, which shall be made against her person, crown, or dignity.

["And I will do my utmost endeavour to disclose and make known to her Majesty and her successors, all treasons and traitorous conspiracies, which I shall know to be against her, or any of them.

["And I do faithfully promise, to the utmost of my power to support, maintain, and defend the succession of the crown against the descendants of the said James, and against all other persons whatsoever; which succession, by an act entitled 'An Act for the further limitation of the crown, and better securing the rights and liberties of the subject,' is, and stands limited to the princess Sophia, electress and duchess dowager of Hanover, and the heirs of her body, being Protestants.

["And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God."]

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith, or allegiance, in form. For as the queen, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before her coronation; so the subject is bound to her by an

intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were instituted only to remind the subject of this, his previous duty, and for the better securing its performance. The formal profession therefore, or oath of subjection, is nothing more than a declaration in words, of what was before implied in law. ["All subjects," says Sir Edward Coke, "are equally bounden to their allegiance as if they had taken the oath: because it is written by the finger of the law in their hearts, and the taking of the corporal oath, is but an outward declaration of the same."] The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the social tie, by uniting it with that of religion.

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the queen's dominions, immediately upon their birth. For immediately upon their birth, they are under the queen's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is, therefore, a debt of gratitude which cannot be forfeited, or cancelled,—a tie which cannot be severed or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. [Thus, on the recognition of the independence of the United States of America, it was decided that the natural-born subjects of the English crown, adhering to the United States, ceased to be British subjects, and became aliens.] An Englishman who removes to France, or to China, owes the same allegiance to the queen of England, there, as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one

prince cannot by any act of his own,—no, not by swearing allegiance to another,—put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. [*Nemo patriam, in quâ natus est, exuere, nec ligeantiæ debitum ejurare, possit.**] Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled, by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able, at pleasure, to unloose those bands by which he is connected to his natural prince. [In certain cases he may forfeit his rights as a British subject, by adhering to a foreign power, but remains always liable to his duties: and if, in the course of his employment under a foreign power, he violate the laws of his native country, he will be liable to punishment, as soon as he comes within reach of her tribunals.†]

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the queen's dominion and protection; and it ceases, the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local, temporary only, and for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As, therefore, the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this

* Co. Litt.

† 2 Steph. Comm. 392.

realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence; and, in point of locality, to the dominions of the British empire [according to the rule universally recognised—*Protectio trahit subjectionem, et subjectio protectionem.**]

This allegiance then, both express and implied, is the duty of all the queen's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguished by the same criterions of time and locality; natural-born subjects having, as we have seen, a great variety of rights, which they acquire by being born within the queen's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour. The same is also, in some degree, the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principal lines, whereby they are distinguished from natives.

An alien born may purchase lands, or other estates; but not for his own use; for the queen is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the queen of England; which would probably be inconsistent with that which he owes to his own natural liege lord; besides, that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. [By the recent alien act, an alien friend may now hold every species of personal property, "except chattels real," as effectually as a natural-born subject, and hold lands and houses, for residence, or business, for twenty-one years. And indeed almost all the rights and privileges of natural-born subjects, may be now acquired by aliens intending to settle in this country, on obtaining the

* Coke Litt. 129*a*.

certificate, and taking the oath, prescribed by the recent alien act.]

When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the queen's special favour, during the time of war.

When I say, that an alien is one who is born out of the queen's dominions, or allegiance, this also must be understood, with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary, after the restoration, "for the naturalisation of children of his majesty's English subjects, born in foreign countries, during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two allegiances, or serve two masters at once. Yet the children of the king's ambassadors, born abroad, were always held to be natural-born subjects; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held, by a kind of *postliminium*,* to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided both their parents were, at the time of the birth, in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit, as if born in England; and accordingly it has been so adjudged in behalf of merchants. But, by several more modern statutes these restrictions are still farther taken off; so that all children

* The *Jus Postliminii* was a legal fiction of the Roman law, signifying a *right of return*: by which a Roman captive, if he escaped, or was retaken from the enemy, was regarded as having never been within their power, and as consequently never having lost his civil rights.

born out of the queen's ligeance, whose fathers, or grandfathers, by the father's side, were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their ancestors were attainted, or banished beyond seas, for high treason; or were, at the birth of such children, in the service of a prince at enmity with Great Britain.

[The children of aliens, born in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. And by statute 7 & 8 Vict. c. 66, § 3, every child born abroad, whose mother is a natural-born subject of the united kingdom, is capable of holding any real and personal estate.]

A DENIZEN is an alien born, but who has obtained *ex donatione reginæ*, letters patent to make him an English subject; a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance; for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; but his issue born after, may. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c., from the crown. [Till the year 1844, naturalisation could not have been effected but by act of parliament. In that year, as we have already seen, not only were important restrictions removed, in the case of parliamentary naturalisation, but naturalisation itself may be effected in a far less troublesome and expensive manner, viz., by obtaining the certificate of a secretary of state. By statute 7 & 8 Vict. c. 66, an alien, coming *to settle* in any part of the united kingdom, may memorialise the

secretary of state, for the purpose of obtaining a Certificate of naturalisation; which, on proving the truth of his memorial, will be granted to him. By means of this certificate, on taking the oath specified in the act, he will be invested with all the rights of a natural-born British subject, except that of becoming a privy councillor, or member of parliament, and also with such other exceptions as may be specified in the certificate. Any foreign woman, moreover, married to a natural-born or naturalised subject, shall be taken to be herself naturalised, and have all the rights and privileges of a natural-born subject. Aliens may also be naturalised in any of the British colonies, or possessions, (10 & 11 Vict. c. 83,) subject to confirmation or disallowance by the queen.

[The liberal spirit breathing through this enactment may suggest the aphorism of Lord Bacon, "that all states that are liberal of naturalisation towards strangers, are fit for empire."*

[Before quitting the subject of the people, it may be stated, that by statute 13 & 14 Vict. c. 53, a census of the population of Great Britain and Ireland, and the adjacent islands, was taken, in a far more extensive and systematic manner than on any former occasion; and, by its means, the interesting fact, among many others, was ascertained, that during the last fifty years, the population has been nearly doubled. Such an increase, coupled with other causes in operation, leads to corresponding changes in the condition of the people, and the policy of government.—On the night of the 31st of March, 1851, the population of the united kingdom is stated by the census to have been nearly 28,000,000 (that is 27,833,501). The area of all the islands, great and small, constituting the united kingdom, is 122,552 square miles; that of England, 50,922; Ireland, 32,514; Scotland, 31,324; Wales, 7,398: the islands in the British seas, 394 square miles.]

* Essays, xxx., of Kingdoms and Estates.

CHAPTER XXVIII.

THE UNITED CHURCH OF ENGLAND AND IRELAND.

[IT has been seen,* that by the fifth article of the union between Great Britain and Ireland, "the Churches of England and Ireland shall be united into one Protestant Episcopal Church, to be called THE UNITED CHURCH OF ENGLAND AND IRELAND; † that the doctrine and worship shall be the same; and that the continuance and preservation of the United Church, as the established church of England and Ireland, shall be deemed an essential and fundamental part of the union." Of that church the king or queen of England is, by the laws of England, the head, and supreme governor. In a previous chapter, Blackstone states that to enter into the reasons on which this prerogative is founded, is matter rather of divinity, than law; and he contents himself with stating the king's statutable title, under the *declaratory* act, 26 Hen. VIII. c. 1:—which, reciting that "the king's majesty justly and rightfully, is and ought to be, the supreme head of the church of England, and so is recognised by the clergy of this realm, in their convocations"—enacts that the king "shall be taken,

* Ante, p. 80.

† The same article declares that "the church of *Scotland* shall remain the same as is now established by law, and by the acts of union of England and Scotland."

accepted, and reputed the only supreme head, in earth, of the church of England." This was repealed by an act of queen Mary, but was not revived by that next mentioned (1 Eliz. c. 1), entitled "An Act restoring to the crown the ancient jurisdiction over the state, ecclesiastical and spiritual, and abolishing all foreign power repugnant to the same." Every section of this act is worthy of close observation, in order to ascertain what statutes it repeals, suffers to remain repealed, or revives. The sixteenth section enacts as follows: "That no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall at any time . . . . use, enjoy, or exercise, any manner of power, jurisdiction, superiority, authority, pre-eminence or privilege, spiritual or ecclesiastical, within this realm, or within any other of her majesty's dominions or countries that now be, or hereafter shall be; but from thenceforth the same shall be clearly abolished out of this realm, and all other her highness's dominions for ever."

[The seventeenth section enacts as follows: "That such jurisdictions, privileges, superiorities and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority, hath heretofore been, or may lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever, by authority of this present parliament, be united and annexed to the imperial crown of this realm."

[The nineteenth section prescribes an oath of supremacy, the first article of which is "that the queen's highness is the only supreme governor of this realm, and of all other her highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal."

[The subject is bound to the recognition of the queen's supremacy, by an oath. The 55th canon of our church

describes her as "supreme governor in this realm, and all other her dominions, over all persons, in all causes as well ecclesiastical, as temporal."

[When the queen is thus entitled "the supreme head, in earth, of the church of England," nothing is signified inconsistent with the pure faith of the gospel, or savouring of impious presumption. What is meant is, that she is, under God, the supreme *visible* governor of the whole realm, of which that church is a part; deriving her right directly from the adorable founder of that church. He, who *is head over all things to his church,** exercises over it a two-fold government. The one is *interior*, and purely spiritual, administered by His own spirit, through the agency of His appointed ministers; the other, *exterior*, administered in the course of that providence which has been placed under His control, for this especial purpose, through the hands of the temporal sovereigns of each country in which that church is established. In the language of an eminent living divine, Christ is the one invisible source of inward life to his body, the church; kings exercise an external rule over those visible members of it, who live in their times and countries. The ecclesiastical headship of kings, therefore, is so far from being inconsistent with that of Christ, that it is subordinate and ministerial to it.† This ecclesiastical authority of kings, rests not on the vain, arbitrary enactments of mere positive human law, but on the solid foundation of reason, scripture and authority. "Kings serve God," says St. Augustine, "when they order what is good, and prohibit what is bad, not only in secular matters, but in spiritual; and unless they do so, how shall they be able to render an account hereafter to Almighty God? This, then, is their duty: to maintain the peace of the church, whose spiritual children they are."‡ These were

* Eph. i. 22.

† Theophilus Anglicanus, by Dr. Wordsworth, p. 228.

‡ St. August. Tractat. in Joann. 11.

the sentiments, not of this great and venerable father alone, but universally entertained by christians after the empire became christian. He who would raise objections to the supreme power, both of right and duty, exercised in the sense of St Augustine, as above explained, in spiritual matters, by the sovereigns of England, would find himself opposing the principles of reason on which all christian monarchy rests; he would be contravening the examples of the Old Testament, and the precepts of the new; and he would be not only condemning the practice of Constantine, Theodosius, and Justinian, and all the great christian emperors and kings, especially those of England: but impugning the judgment of Chrysostom, St. Basil, St. Augustine, and St. Jerome, and all the wisest and most pious fathers of the church.* By the expression, "Head of the church," says our incomparable Hooker,† "we do but testify, that we acknowledge kings to have supreme government, even over all, both persons and causes. If *the having* of supreme power be allowed, why is the expressing thereof by the title of 'Head' condemned?" Thus explained, the doctrine may be received as sound christian truth, as it is undoubtedly constitutional law; and every christian and loyal subject is bound to uphold the queen's ecclesiastical, as firmly as her civil, supremacy; as being the very key-stone of the arch of our political fabric, of our civil and religious liberties; incorporated into, and identified with our whole protestant system. The twin statute of this, and passed at the same time (c. 2), is entitled "An Act for the uniformity of common prayer and divine service in the church, and the administration of the sacraments." These two statutes—the acts of supremacy and uniformity—are the links binding together CHURCH AND STATE: the former abrogating all jurisdiction and legislative power of eccle-

* See Wordsworth's Theoph. Anglicanus.

† Ecclesiast. Pol. book viii. c. 4. The whole of this masterly chapter, "of the Title of Headship," is worthy of careful study.

siastical rulers, except under the authority of the crown; and the latter prohibiting all changes of rites and discipline, without the approbation of parliament. The sovereign, by virtue of the authority, thus conferred, convenes, prorogues, and dissolves all ecclesiastical synods, or convocations.

[The CONVOCATION, or ecclesiastical synod, in England, unlike those of other kingdoms, does not consist of bishops only, but is the miniature of a parliament, wherein the archbishop presides with regal state: the upper house of bishops, represents the house of lords; the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons, with its knights of the shire, and boroughs. The convocation was formally summoned at the opening of parliament, at the close of which it was prorogued or dissolved in the same way. It met once formally, but only to adjourn. It has never sate for the despatch of business, till very recently, since the year 1717; when its sittings were suspended on account of its unseemly and dangerous proceedings, in the case of Dr. Hoadley, bishop of Bangor.

[The revival of convocation, however, has of late years been advocated with extreme earnestness, and as strenuously resisted. The reasons in favour of such a course, and against it, are numerous and grave, regard being had to the true interests of both church and state, the temper alike of the clergy and laity, and the special circumstances and recently developed tendencies of the times.

[From this prerogative, of being the head of the church, arises the crown's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments, as will be presently seen.

[In this capacity, also, the sovereign is the *dernier resort* in all ecclesiastical causes: a right restored by statute 25 Hen. VIII. c. 19, § 3, 4, which prohibits ecclesiastical appeals to the pope, and requires them to be made to the king in chancery. That jurisdiction is now,

however, vested in the judicial committee of the privy council (stats. 2 & 3 Will. IV c. 92, § 3; & 3 & 4 Will. IV. c. 41, § 8). The late case of *Gorham* v. *The Bishop of Exeter* (15 Q. B. 52), affords a memorable illustration of the operation of this branch of the royal prerogative.]

CHAPTER XXIX.

UNION BETWEEN CHURCH AND STATE.

[THE idea of a RELIGIOUS ESTABLISHMENT, is that of a system of religious instruction, endowed and patronised by law, with a preference given to it, by the state, over all other systems, and to its teachers over the teachers of all other forms of belief. As to the abstract propriety of such an establishment, opinions may reasonably be expected to differ in a free country. Objectors say, first, that it is a grievance for a man to be compelled to support a form of religion of which he conscientiously disapproves: secondly, that though religious instruction be the motive for supporting an establishment, the civil magistrate gains from it secular support, and so subjects its teachers, their doctrines and conduct, to secular influence: thirdly, that the establishment of one religious class, tends to the restraint of freedom in both spirit and thought; to intolerant practices; and to obstructing the progress of general improvement. Those who admit the serious weight of these objections, allege nevertheless on the other hand, that if left to supply themselves with religious and moral knowledge and instruction, the classes most requiring, would be the least apt to obtain, either: secondly, if the people are to provide for their own pastors, so must they select them; and very serious evils attend the *election* of a religious instructor:

thirdly, if indolence be imputed to the minister of a state church, that is less hurtful than the extreme activity of the popular sectary; which will, moreover, operate as a prevention to the indolence of state clergy: lastly, secular interference can belong to a purely voluntary system of religious instruction; there being no political subject, which may not be represented as fully within the scope of their sacred ministry.

[These are the leading arguments, involving, undoubtedly, questions of extreme speculative and practical difficulty, for and against a religious establishment, as stated by a person of great eminence;* who, after dispassionately weighing them, comes to the conclusion that, on the whole "greater mischiefs result from having no establishment at all; and that the balance is decidedly in favour of such an institution."

[Bishop Warburton lays it down as a great preliminary and fundamental article of the alliance between the church and the state, "that the church shall apply its utmost influence in the service of the state; and the state shall support and protect the church:" the motive of the state in seeking that alliance, having been, to preserve the essence and purity of religion, to improve its usefulness, and apply its influence in the best manner, by bestowing additional reverence and veneration on the person of the civil magistrate, and on the laws of the state; and to prevent the mischiefs which the church, in its natural independent condition, might occasion to civil society.

[This alliance exists, in fact, and *as* a fact; and is interwoven with the whole tissue of our national institutions. It cannot now be separated, without perilling the welfare and the very existence of the body politic, and doing irreparable injury to both church and state. It is the duty of each, ever and most solemnly to remember the true objects

* Lord Brougham; Polit. Philosophy, vol. iii. pp. 129, &c. &c.

of that union, and so strengthen its hold upon the intellect and the heart of an enlightened people. No christian statesman can fail to regard, as the true and lasting object of society, the promotion of man's present and future happiness, and in so doing the glory of his Maker. Our rulers should regard the state, as religion regards an individual; as having temporal, subordinate to eternal interests, with corresponding duties, motives, and objects. "In a christian commonwealth," says the illustrious Edmund Burke, "the church and the state are one and the same thing, being different integral parts of the same whole. Religion is so far from being out of the province, or duty of a christian magistrate, that it is, and it ought to be, not only his care, but the principal thing in his care; because it is one of the great bonds of human society, and its object the supreme good.—the ultimate end and object of man himself."

[Considerations of this nature purify and elevate mankind, and tend towards that singleness of purpose and moderation of spirit, before which many vexing difficulties melt away, especially touching that most sensitive of all rights, the rights of conscience: and thereby may be avoided a tendency to either latitudinarianism, or intolerance.

[The last half century has seen the legislature more and more anxious and successful, in its efforts to extend the usefulness of the established church, not only at home, as has already been briefly indicated, but abroad, in our colonies and elsewhere: while the individual members of that church, and those who conscientiously dissent from its discipline, and many of its doctrines, are nobly rivalling each other in voluntary efforts to diffuse the blessings of christianity throughout the whole earth.]

CHAPTER XXX.

CHURCH OF SCOTLAND.

[HAVING given some account of the united church of England and Ireland, as by law established, since the union of Great Britain and Ireland, it is proper to exhibit an outline of the constitution of the church of Scotland: the inviolable maintaining of which is, by the statute effecting the union between England and Scotland, a matter of such solemn sworn obligation to the sovereigns of the United Kingdom, on their accession to the throne.

[The established church of Scotland is PROTESTANT and PRESBYTERIAN: that mode of ecclesiastical government having been introduced there from Geneva, by the celebrated John Knox. By Presbyterian, from the Scripture term πρεσβυτερος, i.e., elder, is meant, those Christians who maintain, that there is no order in the church superior to that of Presbyters, or Elders: denying any distinction between the words πρεσβυτερος, and επισκοπος,—*elder*, and *bishop*. The Presbyterians believe that the authority of their ministers is in no respect inferior to that possessed by the ministers of any other church, and is derived from the Holy Ghost, by the imposition of the hands of the Presbytery, or assembly of Presbyters. While opposing the Independent, or Congregational scheme of the common rights of Christians, by the same arguments as are used by

Episcopalians, they affirm that in the Christian church there is no order superior to that of Presbyters; that all ministers are equal by their commission; that "Presbyter" and "Bishop" are of identical signification; and that *prelacy*, or Diocesian Episcopacy, with all its powers and prerogatives, was gradually established on the primitive practice of making the *moderator*, or president of the Presbytery, a permanent office; until "by little and little," as Jerome expresses it, "the whole pastoral care of the flock devolved upon one man." It is due to the church of Scotland to state, that her mode of worship is solemn and simple; her established faith, agreeable to that of most of the other Protestant churches; and that her pastors are eminently distinguished for their piety and zeal. Her judicatures are composed of both clergy and laity. Every regulation of public worship, every act of discipline and of ecclesiastical censure, emanates from a certain number of clergymen and laymen, acting together with equal authority, and deciding every question by a majority of voices. The laymen who thus act in the Ecclesiastical courts, are called 'rulers,' or 'lay elders;' several of whom exist in every parish, being publicly set apart for the purpose, by the minister, by solemn prayer.

[There are four Ecclesiastical judicatures in the church of Scotland. First, the *Kirk Session*, consisting of the minister, and three lay elders: the former *ex officio* moderator, but with no negative power, nor indeed right to vote, except on an equality of voices of the elders. Secondly, the *Presbytery*, consisting of all the pastors within a certain district, and one ruling elder deputed by his brethren from each parish, to represent, with the minister, the session of that parish. The powers of the Presbyteries are as large as can be entrusted to any ecclesiastical body, in respect of both doctrine and discipline—to adjudge heresy, and to excommunicate. From this body an appeal lies to, Thirdly, the *Provincial Synod*, fifteen in number, usually meeting twice

a year, exercising over the Presbyteries within the province, a jurisdiction similar to that exercised by each Presbytery over its several Kirk Sessions. Lastly, the highest authority in the church of Scotland is the *General Assembly*, which consists of a certain number of ministers and ruling elders, delegated from each Presbytery, and commissioners from the universities and burghs: the commission being chosen annually, six weeks before the meeting of the assembly, and the ruling elders consisting often of the most eminent men in Scotland. The assembly meets once a year, and the Queen presides, by her commissioner,—always a nobleman, but having no voice in their deliberations. The moderator of the assembly is chosen from among the ministers. To this assembly, appeals are brought from all the other ecclesiastical courts of Scotland; and in questions purely religious, its decisions are final.—Such is the compact organisation, Parochial, Presbyterial, Provincial, and National, of the established church of Scotland. Its doctrines are according to the "Westminster Confession," the standard of the national faith, which all ministers are required to subscribe.

[By the act of 5 Anne, c. 8, the sovereigns, on accession, swear and subscribe a declaration, in the most precise and stringent terms that can be devised, that they will inviolably maintain and preserve the recited settlement of the true Protestant religion, contained in the "confession of faith" with the government, worship, discipline, rights, and privileges of the church, as established at the time of the union, by the law of Scotland, with the form and purity of worship then in use in that church, and its Presbyterian church government, and discipline by Kirk Sessions, Presbyters, Provincial Synods, and General Assemblies; which shall continue unalterable; and that the aforesaid Presbyterian government shall be the only government of the church within the kingdom of Scotland.]

CHAPTER XXXI.

DISSENTERS, ROMAN CATHOLICS, JEWS.

[I. PROTESTANT DISSENTERS.—The free exercise of religious profession and opinion, has been enumerated among the rights secured to the subjects of this realm, by the laws of England—but it was not always so; and a reference to the harsh and crushing laws formerly in force against nonconformists, dissenters and others, is oppressive, indeed, to those breathing the pure invigorating atmosphere of civil and religious freedom. Blackstone says well, that our ancestors were mistaken in their plans of compulsion and intolerance. The civil magistrate, if men quarrel with the ecclesiastical establishment, has nothing to do with it, unless their tenets and practices be such as threaten ruin or disturbance to the state. He is bound to protect the established church; but this point once secured, all persecution for the diversity of opinions, however ridiculous or absurd they may be [deemed], is contrary to every principle of sound policy, and civil freedom.

[While we enjoy the refreshing sunlight of religious freedom, which has dispelled the clouds of intolerance and bigotry, let us, in justice to our ancestors, and in palliation of their errors, bear in mind the circumstances in which they were placed, and the dangers against which they sought

to provide. They conceived that the only security for the menaced protestant faith, was a compulsory conformity to the worship and discipline of the established church, which they carried out ruthlessly. With the glorious revolution, however, the sun of religious liberty began to dawn, and its beams, have at length. melted away the last shadows of intolerance and persecution.

[T]he nonconformist of a former day, is the dissenter of the present: and we learn from the census of 1851, that there are in England and Wales, no fewer than thirty-six different religious sects and communities, every member of which is protected by the legislature, in the exercise of his belief and worship, as anxiously and effectually as those of the established church. In the year 1846 an act, (stat. 9 & 10 Vict. c. 59) repealing a great number of statutes affecting Dissenters, Roman Catholics, and Jews, expressly declared "that all laws then in force, against the wilfully and maliciously, or contemptuously, disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by any former act or acts of parliament; or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting, assembly, or congregation; or any person or persons there assembled; shall apply respectively to all meetings, assemblies, or congregations whatsoever, of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last mentioned meetings, assemblies, or congregations, and the persons there assembled." By a previous act, in the year 1844, (stat. 7 & 8 Vict. c. 45) dissenting meeting-houses, schools, and other charitable foundations are declared entitled to all the benefits of the statutes which it recites. The act also contains an excellent provision for ascertaining, when rendered necessary, by obscure or defective wills, and trust deeds, the particular religious doctrines, opinions, and mode of worship required to be taught and adopted in such meeting-houses—namely,

by the *usage* of the congregation frequenting it, for twenty-five years immediately preceding the institution of legal proceedings in respect of such instruments.'

[Again, dissenters are now (by stat. 9 Geo. 4, c. 17) eligible for any municipal or other office, place, trust, or emolument, without being required first to receive the sacrament of the Lord's supper, according to the rites or usage of the church of England: but they must first make the following solemn DECLARATION—"I do solemnly and sincerely, in the presence of God, profess, testify and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence, which I may possess, by virtue of the office of ———, to injure or weaken the protestant church, as it is by law established in *England*, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights, or privileges to which such church, or the said bishops and clergy are, or may be, by law entitled."

[The conscientious scruples of dissenters, again, have been consulted with regard to the rite of marriage; which need not be solemnised by a clergyman, or according to the ceremonies of the established church, but—subject to the provisions of statute 6 & 7 Wm. IV. c. 85,—in any form the parties may choose to adopt. Their places of worship, moreover, by a recent act (15 & 16 Vict. c. 36), need be no longer certified to the archbishop, bishop, or quarter sessions, but with the registrar-general.

[Dissenters are now also (stat. 17 & 18 Vict. c. 81, §§ 43, 44), capable of entering the University of Oxford, and taking the degree of bachelor in arts, law, medicine, or music, without making or subscribing any declaration, or taking any oath: which are, however, still necessary to qualify such graduate for any office theretofore always held by a member of the church of England, and for which such degree had theretofore constituted a qualification. Quakers, Moravians, or those who have been such, and separatists,

may also give evidence on affirmation, instead of oath; and by the common law procedure act, 1854, *any person* sincerely and conscientiously objecting to be sworn, may make a solemn affirmation in these words, "I do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful," then proceeding to make a declaration.

[To this list of exemptions and enfranchisements it may be added, that it has been proposed to discharge dissenters from the liability to church rates, to the payment of which, they allege themselves to entertain conscientious objections: but this is a question of importance and difficulty, and now under the consideration of the legislature.

[II. ROMAN CATHOLICS.—Though the great philosopher Locke denied the right of the Roman Catholic church to toleration by the state, on account of the nature of its principles and pretensions, the solution of this great problem in legislation, was attempted by the legislature in the year 1829, by stat. 10 Geo. IV. c. 7, entitled "An Act for the relief of his Majesty's Roman Catholic subjects;" by which they were restored to the enjoyment of civil rights, except that of holding ecclesiastical offices, and interfering in matters relating to the established church; or of holding or exercising the office of Guardian, Justice, or Regent of the United Kingdom; or (otherwise as then by law enabled) of Lord Chancellor of England, or Ireland; Lord Lieutenant of Ireland; or High Commissioner to the General Assembly of the Church of Scotland. The following is the oath which Roman Catholics take, instead of that of allegiance, supremacy, or abjuration, on entering parliament, or being appointed to office. The terms of this oath are suggestive of the difficulties which the legislature had to encounter.

["I do solemnly promise and swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria; and will defend her, to the utmost of my power, against all conspiracies and attempts whatever, which shall be made

against her person, crown or dignity; and I will do my utmost endeavour to disclose and make known to her majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown, which succession by an act, entitled '*An Act for the further limitation of the crown, and better securing the rights and liberties of the subject*,' is and stands limited to the princess *Sophia*, electress of *Hanover*, and the heirs of her body, being protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person, claiming or pretending a right to the crown of this realm: and I do further declare, that it is not an article of my faith,—and I do renounce, reject, and abjure the opinion—that princes excommunicated, or deprived by the pope, or any other authority of the see of *Rome*, may be deposed or murdered by their subjects, or by any person whatsoever. And I do declare, that I do not believe that the pope of *Rome*, or any other foreign prince, prelate, person, state, or potentate, has, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. I do swear that I will defend to the utmost of my power, the settlement of property within this realm, as established by the laws. And I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm. And I do solemnly swear, that I never will exercise any privilege to which I am, or may become, entitled, to disturb or weaken the protestant religion, or protestant government, of the United Kingdom; and I do solemnly, in the presence of God, profess, testify and declare that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me GOD."

[No person in holy orders in the church of Rome, can be elected to serve in the house of commons. Roman Catholics may be members of lay corporations, but cannot vote at, or in any manner join in ecclesiastical appointments in the gift, patronage or disposal of such corporations; nor hold any place or office in the churches of England and Ireland, and of Scotland; or the ecclesiastical courts, universities, or public schools: nor present to benefices; nor advise the crown in the appointment to offices in the churches of England and Ireland, or Scotland: nor are they to assume or use the name, style, or title of archbishop, bishop, or dean, of any province, bishoprick, or deanery, nor, by statute 14 & 15 Vict. c. 60, of any place whatever in the United Kingdom. No judicial or municipal officer is to attend, with the insignia of office, at any place of worship, except the established churches of England and Ireland, and Scotland. No Roman Catholic ecclesiastic, or member of any of the orders, communities, or societies mentioned in the act, bound by religious or monastic vows, is to exercise any of the rites or ceremonies of the Roman Catholic church, or wear the habits of his order, save within their usual places of worship, or in private houses; and Jesuits and members of monastic orders, communities, or societies of the church of Rome, bound by religious and monastic vows, are not to be in the kingdom, without the written license of the secretary of state, who may at any time revoke such license. No Jesuit, or member of any such religious order, community, or society shall admit any person to become a regular ecclesiastic, or brother, or member, or aid or consent to it, or aid or assist in administering any oath, vow, or engagement purporting, or intending to bind the person taking the same to the rules, ordinance, or ceremonies of such religious order, community, or society, on pain of banishment for life: —but these provisions do not extend to religious orders, communities, or establishments consisting of females bound by religious or monastic vows. Roman Catholics also enjoy

the same rights, in respect of their places of worship, schools, and charitable foundations, as protestant dissenters. Finally, by the two recent statutes 7 & 8 Vict. c. 102, & 9 & 10 Vict. c. 59, were repealed a great number of obsolete statutes deemed by the Roman Catholics offensive and injurious.

[III. THE JEWS, also, are entitled to the full and free exercise of religious worship, and the observance of all their ancient and venerable rites and ceremonies. By statute 9 & 10 Vict. c. 59, their places of worship, schools, and charitable foundations, are placed on the same footing as those of dissenters. Their marriages are left untouched by the legislature. They are by statute 8 & 9 Vict. c. 52, admitted to all municipal offices, on making and subscribing the following declaration.

["I, A. B., being a person professing the Jewish religion, having conscientious scruples against subscribing the declaration contained in an act passed in the ninth year of the reign of king George IV. entitled '*An Act for repealing so much of several acts as imposes the necessity of receiving the sacrament of the Lord's supper as a qualification for certain offices and employments*,' do solemnly, sincerely and truly declare, that I will not exercise any power, or authority, or influence which I may possess, by virtue of the office of ——, to injure or weaken the protestant church, as it is by law established in *England*, nor to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, may be by law entitled."

[Jews, however, are excluded from becoming members of the legislature, inasmuch as they refuse to take the oath of abjuration, containing the words "*upon the true faith of a christian*,"* which, as we have already seen, it has been solemnly decided, form an integral part of the oath, and

* *Miller* v. *Salomons*, 7 Excheq. 475, confirmed in error 8 Excheq. 778.

cannot be dispensed with. Frequent applications have been recently made to the legislature, to admit Jews into parliament, but in vain.

[Thus stands the law with respect to Dissenters, Roman Catholics, and Jews: who have been recently relieved from almost all those disabilities and penalties deemed, by themselves, so obnoxious and oppressive; such few only of the former, being retained, as the legislature deems fitting for the security of our protestant and christian institutions; especially of that mild and tolerant church, which is established within these realms, and whose benign influence it should be the object of all its members to uphold and extend, by their conduct and example.]

CHAPTER XXXII.

THE CLERGY.

[1 Bla. Com., p. 376—395.]

THIS venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of Almighty God, have therefore large privileges allowed them by our municipal laws. A clergyman cannot be compelled to serve on a jury. Neither can he be chosen to any temporal office, as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred functions. During his attendance on divine service, *eundo, morando, et redeundo*, he is privileged from arrest in civil suits. But as the clergy have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen, are incapable of sitting in the house of commons, [or of being chosen counsellors, or aldermen; in boroughs,] and are not, in general, allowed to engage in any manner of trade, nor sell any merchandise; which prohibition is consonant to the canon law. [They may, however, be schoolmasters, or deal with booksellers as to the sale of books; or be managing directors, or shareholders, in any benefit, fire, or life insurance society; or buy, or sell, in respect of their occupation of land, or sell its mineral produce; but they must not do so

in person, or in any market, or place of public sale (stat. 1 & 2 Vict. c. 106, §§ 28—30.]

In the frame and constitution of ecclesiastical polity, there are divers ranks and degrees: which I shall consider in their respective order.

An Archbishop, or Bishop, is constituted by election, confirmation, consecration, and enthronisation, in the former, and installation in the latter, case. The election is by the chapter of his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all Christendom, and was promiscuously performed by the laity as well as the clergy (*per clerum et populum*); till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe, took the appointment, in some degree, into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated, nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, A. D. 773, by pope Hadrian I., and the council of Lateran, and universally exercised by other Christian princes: but the policy of the court of Rome, at the same time, began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct nomination. But when, by length of time, the custom of making elections by the clergy, only, was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*,—by the prince's delivering to the prelate a ring, and pastoral

staff or crosier: pretending that this was an encroachment on the church's authority, and an attempt, by these symbols, to confer a spiritual jurisdiction: and pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan, then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future, *per sceptrum*, and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops, for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend, for awhile, its other pretensions.

This concession was obtained from king Henry I. in England, by means of that obstinate and arrogant prelate, archbishop Anselm; but king John, about a century afterwards, in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy: the form of granting a licence to elect, which is the original of our *congé d'eslire*, on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied, without a reasonable and lawful cause. This grant was expressly recognised and confirmed in king John's *magna charta*, and was again established by statute 25 Edw. III. st. 6.

But by statute 25 Hen. VIII. c. 20, the ancient right of

nomination was, in effect, restored to the crown; it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to proceed to election (or *congé d'elire*), which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may, by letters patent, appoint such person as he pleases. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a præmunire. [In a recent celebrated case * (A.D. 1848), the ecclesiastical officers, at the time of the confirmation of Dr. Hampden, as bishop of Hereford, on the usual challenge "to all objectors to come forward and be heard," and certain persons tendering objections on the score of unsound religious doctrine, refused to receive them. On an application for a mandamus to the archbishop, to hear the objections, the court was equally divided in opinion: two of the four judges thinking it imperative, by statute 25 Hen. VIII., on the archbishop to confirm, without taking cognizance of the objections: and two, that these objections ought to have been heard. Under these circumstances, no mandamus issued.]

There are two archbishops for England and Wales—those of Canterbury, and York: within the province of the former are twenty of the twenty-six bishoprics, and within that of the latter the remaining six—Chester, Durham, Carlisle, Ripon, Manchester, Sodor and Man. The last elected bishop, for the time being, is excluded from the house of lords, by stat. 10 & 11 Vict. c. 108, which provides that the number of English lords spiritual shall not be increased by the creation of any new bishopric. He is consequently not summoned, till a vacancy occurs.]

* *The Queen* v. *Archbishop of Canterbury*, 11 Q.B. 483.

An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them, on notorious cause. He has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop, he, upon receipt of the queen's writ, calls the bishops and clergy of his province, to meet in convocation: but without the queen's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person, to him in person, so it lies also from the consistory courts of each diocese, to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the queen is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months.

It is likewise the privilege, by custom, of the archbishop of Canterbury to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the Holy Scriptures, and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like; and on this *also is founded the right he exercises of conferring degrees, in prejudice of the two universities* [*which do not, however,* entitle to all the privileges of university degrees.]

The power and authority of a BISHOP, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reforma-

tion, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor [who may be, and often is, a layman] is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law. [In case of a charge of any ecclesiastical offence against a clerk in holy orders, or if there exist scandal or evil report against him touching the same, the bishop, of his own accord, or on the application of any party complaining, may appoint a commission to inquire and report whether there be sufficient *primâ facie* ground for instituting further proceedings, which are then held before him and three assessors. This is by virtue of statute 3 & 4 Vict. c. 86, commonly called the Church Discipline Act.]

[It remains to be observed that, by statute 14 & 15 Vict. c. 60, the assumption, unauthorised by law, of the name, style, or title of archbishop, bishop, or dean, of any place in the united kingdom, is rendered liable to a penalty of 100*l.* for every such offence.] It is also the business of a bishop to institute, and to direct induction to, all ecclesiastical livings in his diocese.

Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation; which must be made to some superior. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the queen herself.

II. A DEAN and CHAPTER (the latter consisting of canons), are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see. When the rest of the clergy were settled in the several parishes of each diocese, as has formerly been mentioned,* these were reserved for the celebration of divine service, in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of

* Ante, p. 65, *et seq.*

decanus, or dean, being probably at first appointed to superintend ten canons or prebendaries.

All ancient deans were, till lately, elected by the chapter, by *congé d'eslire* from the king, and letters missive of recommendation: in the same manner as bishops. [Now, however, by statute 3 & 4 Vict. c. 113, all English deaneries are in the direct patronage of the queen, who appoints by letters patent; but the person must have been six complete years in priest's orders (except in canonries annexed to university offices), he must *reside* for at least eight months, and a canon for three months, in every year.]

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the queen or the bishop.

III. An ARCHDEACON has an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it.* He is usually appointed by the bishop himself; and has a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his. He therefore "*visits*" the clergy; and has his separate court for punishment of offenders, by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

IV. The RURAL DEANS are very ancient officers of the church, who seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation, and armed, in minuter matters, with an inferior degree of judicial and coercive authority. [This class of functionaries is now being restored to activity.]

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the PARSONS and VICARS of churches: in treating of whom I shall first

* There is, we believe, no instance, remaining of the former class of archdeacons. J. W. S.

mark out the distinction between them: next observe the method by which one may become a parson or vicar; then briefly touch upon their rights and duties; and, lastly, show how one may cease to be either.

A PARSON (*persona ecclesiæ*), is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person, the church, which is an invisible body, is represented; and he is, in himself, a body corporate, in order to protect and defend the rights of the church, which he personates, by a perpetual succession. He is sometimes called the RECTOR, or governor of the church: but the appellation of parson, is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, sir Edward Coke observes, and he only, is said *vicem seu personam ecclesiæ gerere*. A parson has, during his life, the freehold, in himself, of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes appropriated; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; the law esteeming such corporations equally capable of providing for the service of the church, as any single private gentleman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions, for the increase of their own power and emoluments. At the first establishment of the parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and their division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of

their own fraternities, the endowment of which was construed to be a work of the most exalted piety, subject to the burthen of repairing the church, and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the uses of their own corporation. But in order to complete such appropriation effectually, the queen's licence, and consent of the bishop, must first be obtained; because both the queen and the bishop may, some time or other, have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies; and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron is also necessarily implied; because, as was before observed, the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing, originally made; being annexed to bishoprics, prebends, religious houses, nay even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries, by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses,

amounting to more than one-third of all the parishes in England, would have been, by the rules of the common law, disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c., formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories, that is, such as were filled by foreigners only, were dissolved and given to the crown. And from these two roots, have sprung all the LAY APPROPRIATIONS of secular parsonages, which we now see in the kingdom: they having been afterwards granted out, from time to time, by the crown.

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius*, or VICAR. His stipend was at the discretion of the appropriator; who was, however, bound, of common right, to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere.* But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose. And therefore by statute 4 Hen. IV. c. 12, it is ordained that the vicar shall be perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments, in consequence of these statutes, have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally

called small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed; and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

The distinction therefore between a parson, and vicar, is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish: but a vicar has generally an appropriator over him, entitled to the best part of the profits; to whom he is, in effect, perpetual curate, with a standing salary. [In the year 1836, by stat. 6 & 7 Will. IV. c. 71, followed by various others, a great change was effected in the law of tithes: which the legislature considered to stand on a most unsatisfactory footing—to be unjust, vexatious, and irritating, alike to the tithe owner, and the tithe payer. Tithes were then commuted into a rent-charge, adjusted to the average price of corn; and this commutation may be either voluntary, or compulsory, under the superintendence, and by the agency of, "The tithe commissioners of England and Wales."]

The method of becoming a parson, or vicar, is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. By common law, a deacon of any age, might be instituted and inducted to a parsonage or vicarage: but now, by statute 13 & 14 Car. II. c. 4, no person is capable of being admitted to any benefice, unless he has been first ordained a *priest;* and then he is, in the language of the law, a clerk in orders. [In the church of England, "Holy Orders" include archbishops, bishops, priests and deacons. No deacon, except by dispensation of the archbishop of Canterbury, can be ordained under twenty-three, nor preach under twenty-four years of age: nor without first signing the thirty-nine articles, and taking the oaths of allegiance and supremacy.]

Any clerk may be PRESENTED to a parsonage, or vicarage: that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese, to be instituted. But when a clerk is presented, the bishop may refuse him, upon many accounts. As, 1. If the patron be excommunicated, and remain in contempt, forty days. Or, 2. If the clerk be unfit: which unfitness is of several kinds. First, with regard to his person; as if he be an outlaw, an excommunicate, an alien, under age, or the like. Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of these cases, the bishop may refuse the clerk.

If the bishop have no objections, but admit the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution, the care of the souls of the parish is committed to the charge of the clerk. When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice. Upon institution, also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

INDUCTION is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like: and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not

before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee. [On the supposition of the law, that every parochial minister is resident, it styles him an *incumbent*. Owing to the serious evils occasioned by non-residence, the legislature, in the year 1838, interfered to remedy them, by the important statute 1 & 2 Vict. c. 106 (amended by statute 13 & 14 Vict. c. 98), entitled "an act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and also for making further provisions, respecting the appointment and support of stipendiary curates in England. To this reference may be made, as to a sort of code, on that head of law, so interesting and important to the clergy.]

We have seen, that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By DEATH. 2. By CESSION, in taking another benefice. For by [the two statutes above cited, it is enacted, subject to specified conditions, that no spiritual person shall hold together any two benefices, and that on every admission to a new benefice, or preferment, contrary to those acts, every benefice previously held, shall be *ipso facto* void. In certain cases, however, guided by population, and yearly value, these prohibitions may be dispensed with by the archbishop, on recommendation of the bishop of the diocese.] 3. By CONSECRATION; for, when a clerk is promoted to a bishopric, all his other preferments are void, the instant that he is consecrated. There was, however, till recently, a method, by the favour of the crown, of holding such living *in commendam*, till a proper parson was provided for it; [but this practice was abolished in 1836, by statute 6 & 7 Will. IV. c. 77 § 18.] 4. By RESIGNATION. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made. 5. By DEPRIVATION; either, first, by sentence declaratory in the ecclesiastical court, for fit and sufficient

causes allowed by the common law; such as attainder of treason or felony, or conviction of other infamous crime, in the queen's courts; for heresy, infidelity, gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime, as, for simony.

VI. A CURATE, is the lowest degree in the church; being in the same state that a vicar was formerly,—an officiating temporary minister, instead of the proper incumbent. Though there are what are called PERPETUAL CURACIES, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons exempted from the statute of Hen. IV.) but instead thereof, such perpetual curate is appointed by the appropriator, [and requires neither presentation, institution, nor induction A perpetual curate cannot, however, officiate till after he shall have obtained the bishop's license, as is the case, indeed, with all curates. As already intimated, a recent statute (1 & 2 Vict. c. 106) has made particular and very satisfactory provisions, for the appointment and payment of curates.]

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers, of whom the common law takes notice; and that principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On these officers I shall make a few cursory remarks.

VII. CHURCHWARDENS, who are always laymen, are the guardians or keepers of the church, and representatives of the body of the parish. They are appointed sometimes by the minister, sometimes by the parish, in vestry assemblies, and sometimes by both together, as custom may direct. [In the absence of such custom, they are to be chosen by the parson and parishioners jointly, if they can agree, and if not, each is to choose one. They are usually two, chosen yearly in Easter week, and obliged to serve; and sworn to the faithful discharge of their duty.] They are taken, in

favour of the church, to be for some purposes, a kind of corporation, at the common law: that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Their office also is to repair the church, and make rates for that purpose, recoverable (except where the amount is such, the validity of the rate being undisputed, as may be adjudicated upon by justices) in the ecclesiastical court; [but the law of church-rates stands at present on an unsatisfactory footing, and has repeatedly occupied the attention of the legislature, owing to the determined opposition to it, manifested by Dissenters. Churchwardens were formerly also joined with the overseers, in the care and maintenance of the poor; and still retain those functions, so far as they are not exercised by boards of guardians.] They are empowered to keep all persons orderly while in church; to which end it has been held that a churchwarden may justify the pulling off a man's hat, [irreverently worn there,]* or the removal of the offender from the church.† There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament.

VIII. PARISH CLERKS and SEXTONS ‡ are also regarded by the common law, as persons who have freeholds in their offices; § [but the former may, by statute 7 & 8 Vict. c. 59, be suspended by the archdeacon, for misconduct or neglect.] The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally

* Steph. Comm. 40.

† *Burton* v. *Henson*, 10 M. & W. 105. *Worth* v. *Terrington and others*, 13 M. & W. 781.

‡ From "*segsten*," "*segerstain*"—the keeper of the things belonging to divine worship. Note—a woman may be sexton, *Ollive* v. *Ingram*, 2 Strange, 1114.

§ The commentator meant by this, only that the ecclesiastical court cannot deprive them: for it is thought that the incumbent may remove the clerk, for sufficient cause. "He certainly," said lord Mansfield, "holds his office *quamdiu se bene gesserit*." *R.* v. *Warren*, Cowp. 371. [J.W.S.] And see *Ex parte Enkett*, 3 Dowl. P. C. 327.

appointed by the incumbent, but by custom may be chosen by the inhabitants. [The sexton is chosen by the rector unless, by usage, the parishioners have the right; but his salary, which depends on custom, is paid by the church-wardens.

[There is also, generally attached to the church, a BEADLE, chosen by the vestry, principally to attend upon them in vestry-meetings.]

CHAPTER XXXIII.



NOBILITY, RANK, AND PRECEDENCE.

[1 Bla. Com., 396—407.]

THE civil state consists of the nobility, and the commonalty. The nobility, the peerage of Great Britain, or lords temporal—as forming, together with the bishops, one of the supreme branches of the legislature—we are here to consider according to their several degrees, or titles of honour.

All degrees of nobility and honour, are derived from the queen, as their fountain; * and she may institute what new titles she pleases. Hence it is, that all degrees of nobility are not of equal antiquity. Those now in use are, dukes, marquesses, earls, viscounts, and barons.†

I. A DUKE, though with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them, in rank; his being the first title of dignity, after the royal family. Among the Saxons, the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called Ꝺeꞃeꞇoᵹa;

* 4 Inst. 363.

† For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour*.

and in the laws of Henry I., as translated by Lambard, we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations dukes of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III.; who claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign, created his son, Edward the Black Prince, duke of Cornwall; and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of queen Elizabeth, A.D. 1572, the whole order became utterly extinct; but it was revived, about fifty years afterwards, by her successor, who was remarkably prodigal of honours, in the person of George Villiers, duke of Buckingham.

2. A MARQUESS, *marchio*, is the next degree of nobility. His office formerly was, (for dignity and duty were never separated by our ancestors,) to guard the frontiers and limits of the kingdom,—which were called The Marches, from the Teutonic word *marche*, a limit; such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there, were called "lords marchers," or "marquesses," whose authority in Wales, was abolished by statute 27 Hen. VIII. c. 27; though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II., in the eighth year of his reign.

3. An EARL is a title of nobility so ancient, that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they are called *ealdormen*, *quasi* eldermen, signifying the same as senior, or senator, among the Romans; and also *shiremen*, because they had, each of them, the civil government of a several division, or shire. On the irruption of the Danes, they changed the name to *eorles*, which, according to Camden, signified the

x 2

same in their language. In Latin they are called *comites*, (a title first used in the Empire) from being the king's attendants; "*a societate nomen sumpserunt, reges enim tales sibi associant.*" After the Norman conquest, they were for some time called *counts*, or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties, to this day. The name of earls, or *comites*, is now become a mere title; they having nothing to do with the government of the county; which, as has been more than once observed, is devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and commissions, and other formal instruments, the queen, when she mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved cousin:" an appellation as ancient as the reign of Henry IV.; who being by either his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connection, in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of VISCOUNT, or *vice-comes*, was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry VI., when in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind.

5. A BARON'S is the most general and universal title of nobility; for, originally, every one of the peers of superior rank had also a barony annexed to his other titles. But it has sometimes happened, that when an ancient baron has been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently, one perhaps to the male descendants, the other to the heirs general, whereby the earldom or other superior title has subsisted without a barony; and there are also modern instances, where earls and viscounts have been created with-

out annexing a barony to their other honours: so that now the rule does not hold universally, that all peers are barons. The origin and antiquity of baronies, have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron, which is the lord's court, and incident to every manor, gives some countenance. It may be collected from King John's *magna charta*, that originally all lords of manors, or barons that held of the king *in capite*, had seats in the great council, or parliament; till, about the reign of that prince, the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon in person only the greater barons, leaving the small ones to be summoned by the sheriff, and, as it is said, to sit, by representation, in another house; which gave rise to the separation of the two houses of parliament. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage, but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard II. first made it a mere title of honour, by conferring it on divers persons by his letters patent.

Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created.—The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and when the land was alienated, the dignity passed with it, as appendant. Thus the bishops still sit in the house of lords, in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands; and thus, in 11 Hen. VI., the possession of the castle of Arundel was

adjudged to confer an earldom, by tenures, on its possessor. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony, became no longer necessary to constitute a lord of parliament; but the record of the writ of summons, to him or his ancestors, was admitted as a sufficient evidence of the tenure.

Peers are now created by either writ, or patent; for those who claim by prescription, must suppose either a writ or patent made to their ancestors, though by length of time it is lost. The creation by writ, or the queen's letter, is a summons to attend the house of peers, by the style and title of that barony which the queen is pleased to confer; that by patent, is a royal grant to a subject, of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords; and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony: and therefore the most usual, because the surest, way, is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself make use of it. Yet it is frequent to call up the eldest son of a peer to the house of lords, by writ of summons, in the name of his father's barony; because in that case there is no danger of his children's losing the nobility, in case he never take his seat; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent; for a person created by writ, holds the dignity to him and his heirs, without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures to the grantee only for life. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to

some particular heirs: as, where a peerage is limited to a man, and the heirs male of his body, by Elizabeth his present lady, and not to such heirs by any former or future wife. [It may also be limited to collateral heirs—as, "to a man and his heirs male." In the descent of dignities among males, the right of primogeniture prevails, but not among females.]

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases, a nobleman shall be tried by his peers, in the court of the lord high steward. The great are always obnoxious to popular envy; were they to be judged by the people, they might be in danger from the prejudice of their judges, and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured, indeed, to all the realm, by *magna charta*, c. 29. It is said that this does not extend to bishops, who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility. By statute 20 Hen. VI. c. 9, peeresses, in either their own right, or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marry a commoner, she still remains noble, and shall be tried by her peers: but if she be noble only by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost. Yet if a duchess dowager marry a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation. A peer, or peeress, either in her own right, or by marriage, cannot be arrested or outlawed in civil cases; and they have also many peculiar privileges annexed to their peerage, in the course of judicial proceed-

ings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour:* he answers also to bills in chancery upon his honour, and not upon his oath; but when examined as a witness in either civil or criminal cases, he must be sworn: for the respect which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio, non creditur nisi juratis.* [Lest any doubt should exist on the subject, in the year 1841 was passed statute 4 & 5 Vict. c. 22, abolishing the unjust privilege of benefit of clergy, in the case of a peer of the realm convicted of felony; and enacting "that every lord of parliament shall plead to any indictment for felony, and on conviction, be liable to the same punishment, as any of her majesty's subjects would be on such conviction."]

A peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of Edward IV., of the degradation of George Nevile duke of Bedford, by act of parliament, on account of his poverty, which rendered him unable to support his dignity. But this is a singular instance; which serves at the same time, by having happened, to shew the power of parliament, by which alone it can be effected.

The COMMONALTY, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law PEERS (*pares*) in respect of their want of nobility.

Now, therefore, the first personal dignity, after the nobility, is a KNIGHT of the order of ST. GEORGE, or of THE

* In the earl of *Cardigan's* case, in the year 1841, the duke of Cleveland said, emphatically, in giving his verdict, "Not guilty, *legally*, upon my honour." The reader who wishes to see how the trial of a peer is conducted may refer to the account of that interesting trial, in Warren's "Miscellanies, Critical and Juridical," vol. II. p. 292.

GARTER, first instituted by Edward III., A.D. 1344. Next (but not till after certain official dignities, as privy councillors, and the judges,) follows a KNIGHT BANNERET; who indeed, by statutes 5 Ric. II. st. 2. c. 4, and 14 Ric. II. c. 11, is ranked next after barons; and his precedence before the younger sons of viscounts, was confirmed to him by order of king James I., in the tenth year of his reign. But in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war. Else he ranks after BARONETS; who are the next in order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James I., A.D. 1611, in order to raise a competent sum for the reduction of the province of Ulster, in Ireland; for which reason all baronets have the arms of Ulster * superadded to their family coat. Next follow KNIGHTS OF THE BATH; an order instituted by king Henry IV., revived by king George I. [and enlarged in the years 1815 and 1847,—in the latter instance, for the purpose of conferring distinctions on deserving persons in the civil service of the crown.] They are so called, from the ceremony of bathing, the night before their creation. The last of these inferior nobility, are KNIGHTS BACHELORS: the most ancient, though the lowest order of knighthood amongst us; for we have an instance of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans, was to give their young men a shield and a lance, in the great council: this was equivalent to the *toga virilis* of the Romans; before this, they were not permitted to bear arms, but were accounted as a part of the father's household; after it, as part of the community. Hence some derive the usage of knighting, which has prevailed all over the western world,

* i.e. A hand *gules*, or a bloody hand, in a field *argent*. On the occasion in question, a hundred gentlemen advanced each a thousand pounds, in return for which the title was conferred.

since its reduction by colonies from those northern heroes. Knights are called in Latin, *equites aurati: aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable, that almost all nations call their knights by some appellation derived from a horse. They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown, which in Edward II.'s time amounted to 20*l.* per annum, was obliged to be knighted, and attend the king in his wars, or be fined for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles I., gave great offence, though warranted by law, and the recent example of queen Elizabeth; but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has, since that time, fallen into complete disregard.

These, sir Edward Coke says, are all the names of *dignity* in this kingdom, ESQUIRES and GENTLEMEN being only names of *worship*. But before these last, the heralds rank all colonels, serjeants at law, and doctors in the three learned professions.

ESQUIRES and GENTLEMEN are confounded together by sir Edward Coke; who observes, that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real esquire; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them. 1. The eldest sons of

knights, and their eldest sons in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires sir Henry Spelman entitles *armigeri natalitii*. 3. Esquires created by the queen's letters patent, or other investiture; and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown, and are named esquires, in their commission or appointment. To these may be added, [it would seem, barristers at law: who are stated to have been called 'esquires' in the acts for poll-money; and it has been expressly decided, that in legal proceedings they must be styled, esquires,*] the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings. As for GENTLEMEN, says sir Thomas Smith, they be made good cheap in this kingdom: for whosoever studieth the laws of the realm; who studieth in the universities; who professeth the liberal sciences; and, to be short, who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. [The eldest son of a gentleman has no prior claim to that title; for Lyttleton says (§ 210), "every son is as great a gentleman as the eldest."] A YEOMAN is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo*.

The rest of the commonalty are citizens and burgesses, [comprehending merchants, tradesmen, artificers, and labourers.]

* 2 Steph. Comm. 597.

TABLE OF PRECEDENCE.

[The following is Blackstone's Table of Precedence, with additions and corrections made by Mr. Bowyer[1] with the assistance of that eminent authority, Sir Charles Young, Garter King at Arms.

[In looking at this table, young persons should bear in mind that a person in the lowest, may, and frequently does, in this free and happy country, rise to the very highest rank, short only of royalty.

Note—the names marked * are entitled to their rank by the Statute of Precedency (31 Hen, VIII.)
,, ,, ,, † by Statute 1 Wm. & Mary, c. 21, and others.
,, ,, ,, ‖ (Letters Patent 9, 10, 14 James I.)
,, ,, ,, ‡ Usage and Custom.

* THE KING'S [or QUEEN REGNANT'S] CHILDREN AND GRANDCHILDREN.
* THE KING'S [or QUEEN REGNANT'S] BRETHREN.
* THE KING'S [or QUEEN REGNANT'S] UNCLES.
* THE KING'S [or QUEEN REGNANT'S] NEPHEWS.
* ARCHBISHOP OF CANTERBURY, PRIMATE OF ALL ENGLAND, AND METROPOLITAN.
* LORD CHANCELLOR, or KEEPER, if a baron.
* ARCHBISHOP OF YORK, PRIMATE OF ENGLAND, AND METROPOLITAN.
* ARCHBISHOP OF ARMAGH. } Archbishops of Ireland.
* ARCHBISHOP OF DUBLIN. }
* LORD TREASURER.
* LORD PRESIDENT OF THE COUNCIL, } if barons.
* LORD PRIVY SEAL, }
* LORD GREAT CHAMBERLAIN. (But see stat. 1 Geo. I. c. 3.) } above all of their own degree.
* LORD HIGH CONSTABLE. }
* EARL OF LORD MARSHAL. }
* LORD HIGH ADMIRAL.[2] }
* LORD STEWARD OF THE HOUSEHOLD. }
* LORD CHAMBERLAIN OF THE HOUSEHOLD. }
* DUKES. }
* ELDEST SONS OF DUKES OF THE BLOOD ROYAL.
* MARQUESSES.
‡ DUKES' ELDEST SONS.
* EARLS.
* YOUNGER SONS OF DUKES OF THE BLOOD ROYAL.
‡ MARQUESSES' ELDEST SONS.
‡ DUKES' YOUNGER SONS.
* VISCOUNTS.
‡ EARLS' ELDEST SONS.
‡ MARQUESSES' YOUNGER SONS.
* SECRETARY OF STATE, if a bishop.
* BISHOP OF LONDON.
* ——— DURHAM.
* ——— WINCHESTER.
* BISHOPS, according to seniority of consecration.
* IRISH BISHOPS.
* SECRETARY OF STATE, if a baron.
* BARONS.
† SPEAKER OF THE HOUSE OF COMMONS.
* LORDS COMMISSIONERS OF THE GREAT SEAL.
TREASURER OF THE HOUSEHOLD.
COMPTROLLER OF THE HOUSEHOLD.
MASTER OF THE HORSE TO THE QUEEN.
VICE-CHAMBERLAIN.
SECRETARY OF STATE UNDER THE DEGREE OF A BARON.
‡ VISCOUNTS' ELDEST SONS.
‡ EARLS' YOUNGER SONS.

[1] Comm. on the Constit. Law of England, pp. 505—512.

[2] When the office is in commission, the lords commissioners have no rank as such.

‡ BARONS' ELDEST SONS.
|| KNIGHTS OF THE GARTER.
|| PRIVY COUNCILLORS.
CHANCELLOR OF THE ORDER OF THE GARTER.
|| CHANCELLOR AND UNDER TREASURER OF THE EXCHEQUER.
|| CHANCELLOR OF THE DUCHY OF LANCASTER.
|| CHIEF JUSTICE OF THE QUEEN'S BENCH.
|| MASTER OF THE ROLLS.
|| CHIEF JUSTICE OF THE COMMON PLEAS.
|| CHIEF BARON OF THE EXCHEQUER.
† THE TWO LORDS JUSTICES OF APPEAL, according to priority of appointment.
THE THREE VICE-CHANCELLORS, according to priority of appointment.
|| JUDGES OF THE QUEEN'S BENCH
|| JUDGES OF THE COMMON PLEAS
|| BARONS OF THE EXCHEQUER } according to priority of appointment.
|| BANNERETS MADE BY THE SOVEREIGN UNDER THE ROYAL STANDARD, IN OPEN WAR.
|| VISCOUNTS' YOUNGER SONS.
|| BARONS' YOUNGER SONS.
|| BARONETS.
|| KNIGHTS BANNERETS, NOT MADE BY THE SOVEREIGN IN PERSON IN THE FIELD.
‡ KNIGHTS OF THE THISTLE.
‡ ——— GRAND CROSSES OF THE BATH.
‡ KNIGHTS OF ST. PATRICK.
KNIGHTS OF THE GRAND CROSSES OF ST. MICHAEL AND ST. GEORGE.
KNIGHTS COMMANDERS OF THE BATH.
KNIGHTS COMMANDERS OF ST. MICHAEL AND ST. GEORGE.
‡ KNIGHTS BACHELORS.
‡ SERJEANTS AT LAW.[1]
‡ ELDEST SONS OF THE YOUNGER SONS OF PEERS.
|| BARONETS' ELDEST SONS.
|| KNIGHTS' ELDEST SONS.
|| BARONETS' YOUNGER SONS.
|| KNIGHTS' YOUNGER SONS.

[All the following (except Esquires and Companions of the Bath) have no statutory or other legal precedency, and have therefore no *legal right* to the positions here assigned them.]

‡ FLAG and FIELD OFFICERS [esquires, as holding the queen's commission—the only rank to which they are entitled legally.]
‡ DEANS, CHANCELLORS, and DOCTORS.[2]
COMPANIONS OF THE BATH.
COMPANIONS and CAVALIERS OF ST. MICHAEL AND ST. GEORGE.
‡ ESQUIRES.
‡ GENTLEMEN.
‡ YEOMEN.
‡ TRADESMEN.
‡ ARTIFICERS.
‡ LABOURERS.

[1] There seems some uncertainty about their position.

[2] The degree of Queen's Counsel must give precedence in courts of justice, and every where, being conferred by letters patent under the great seal, but that precedence, except as among themselves, is undetermined.—*Bowyer*, 512.

MARRIED women and WIDOWS are entitled to the same rank among each other, as their husbands would respectively have borne, between themselves, except where such rank is merely professional or official; [and it is an invariable rule, that no office gives rank to the wife or children of the person holding it. Thus even the wife and children of the great officers of state

[Precedency, or right of Pre-audience, in Courts of Justice, is as follows :

THE QUEEN'S ADVOCATE.
——— ATTORNEY GENERAL.
——— SOLICITOR GENERAL.
——— ANCIENT SERJEANT.
——— SERJEANTS.
——— COUNSEL, according to the precedency specially assigned in their patents.

DOCTORS, OR ADVOCATES, IN THE ECCLESIASTICAL COURTS.*
SERJEANTS AT LAW.
BARRISTERS AT LAW, according to the date of their call to the Bar.†

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have no rank or precedence as such]. UNMARRIED WOMEN are entitled to the same rank as their eldest brothers would bear among men during the lives of their fathers.

* It is a moot question whether Doctors rank before, or after, Serjeants at Law.

† [SPECIAL PLEADERS and CONVEYANCERS, practising without being called to the bar (with the annually conferred permission of their respective inns of courts, by 'Certificates,') are regarded, in strictness, as only students.]

CHAPTER XXXIV.

MILITARY AND NAVAL ESTATES.

[1 Bla. Com., 408—421.]

THE MILITARY STATE includes the whole of the SOLDIERY; or such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm. [It is not necessary, though it would be interesting, here to trace the development of the military force of the kingdom, from the time of our Saxon and Norman ancestors. That may be seen at length in the section of the commentaries from which the ensuing paragraphs are taken, and also in the ninth chapter of Mr. Hallam's "Constitutional History:" but it must be premised, that care should be taken by the student not to confound the strictly *Military* force, serving wheresoever it may be called, with that of a more domestic and defensive character to which alone the name of *Militia* is applicable, which dates from the day of king Alfred: who first settled a national militia in the kingdom. A militia may be defined, as a body of men called from all the different districts in the kingdom, serving by rotation, raised merely for the internal defence of the country, and not subjected, unless when actually embodied, to the duties of the soldier.]

When king Charles the First had exerted some military powers which, having been long exercised, were thought to

belong to the crown, it became a question in the long parliament, how far the power of the militia inherently resided in the king; being, since the repeal of the Statutes of Armour in the reign of James I., unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown; but also seizing into their own hands the entire power of the militia; of the illegality of which, there could never have been any doubt at all.

Soon after the restoration of king Charles the Second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia; to recognise the sole right of the crown to govern and command them; and to put the whole into a more regular method of military subordination; and the order in which the militia now stands by law, is principally built upon the statutes then enacted. It is true the last two of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present and recently consolidated militia laws; the general scheme of which is, to discipline a certain number of the inhabitants of every county throughout the United Kingdom; and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They were not, till the recent statute which will be presently noticed, compellable to march out of their own counties, unless in case of invasion, or actual rebellion within the realm or any of its dominions or territories; nor are they in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline, in general, is liberal and easy; but, when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order.—This is the con-

stitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence. [The present militia law of the united kingdom, depends on statute 15 & 16 Vict. c. 49, consolidating and amending former acts; which was passed in the year 1852, when apprehensions were entertained of the possibility of French invasion. By that act, which has been amended by others, the queen was empowered, with the advice of the privy council, to raise 80,000 militia men,— to be increased to 120,000,—in case of invasion, or imminent danger of it, by voluntary enlistment; or, if that should fail, by ballot: the men to be called out for training, as often as her majesty pleases, and be exercised out of their own counties. In the year 1854, after a considerable portion of this force had been raised, this country became involved, in alliance with France, in a war with Russia; and, in order to supply the alarming losses in our gallant army in the Crimea, the queen was enabled, by stat. 18 & 19 Vict., c. 1, to accept the voluntary offering of their services by the militia, out of the United Kingdom. It was also enacted, by another act, (c. 12,) that during the war, the queen might cause foreigners to be enlisted into her forces; but not to be employed in the United Kingdom, except to be trained and formed into regiments and battalions for foreign service, or as bodies of reserve, solely for training and arraying recruits, and supplying vacancies in such foreign regiments and battalions: but that no greater number than ten thousand men should be thus serving in the United Kingdom, at one time, nor should any be ballotted, or quartered, on any person.]

The Petition of Rights enacts, that no soldier shall be quartered on the subject without his consent; and that no commission shall issue to proceed within this land, according to martial law. After the restoration, king Charles II. kept up above five thousand regular troops, by his own authority, out of his own revenue, for guards and garrisons; [" and the little army thus formed," says our brilliant

historian,* "was the germ of that great and renowned one, which has, in the present century, marched triumphantly into Madrid and Paris,—into Canton and Candahar."] King James II., by degrees, increased the force to no fewer than thirty thousand, all paid from the civil list: but as this was not the purpose for which parliament voted a revenue for the crown, it was made one of the articles of the bill of rights, that the "raising or keeping a STANDING ARMY within the kingdom, in time of peace, *unless it be with consent of parliament*, is against law."

It has, however, for many years past, been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain, even in time of peace, a standing body of troops, under the command of the crown; but who are *ipso facto* disbanded, at the expiration of every year, *unless continued by parliament*. [The command of the army belongs, as we have seen, entirely to the queen, as a matter for her discretion and authority, except so far as it is regulated and controlled by the statute law. She may accept or reject the services of any of her subjects, as officers or privates; and, of her own mere motion, without any enquiry, dismiss from her service. This latter power is, for obvious reasons, not reciprocal; otherwise an officer might be at liberty to quit at the most critical moment when his services were required, and from the most objectionable motives. It is optional with an officer to enter, or return to, the service, if the queen please; but he cannot resign his commission, or discharge himself from the service, without the royal permission. In the case of officers in the employ of the East India Company, also, it was expressly decided by the court of King's Bench, in the time of Lord Mansfield, "that a military officer in the service of the East

* Mr. Macaulay, vol. i. p. 294.

India Company has not a right to resign his commission, at *all* times, and under *any* circumstances whatsoever, or whenever he pleases.*

[Non-commissioned officers and soldiers enter the service by voluntary enlistment, and not, as in other countries, by conscription, or enrolment. The period of service, also, was limited, in the year 1847, in the case of the queen's service, the East India Company's service, and marines, by stat. 10 & 11 Vict., cc. 37, 53. Those periods are now, respectively, ten years in the infantry, and twelve years in the cavalry, artillery, and marines; and if these terms expire during foreign service, the soldier may re-engage, and if unwilling to do so, must be conveyed home at the public expense.

[Here it should be observed that, as the enlistment of her Majesty's subjects on foreign service, against any foreign state, may be prejudicial to, and tend to endanger the peace and welfare of the kingdom, it is declared by statute 59 Geo. III. c. 69, unlawful, and a misdemeanor, to do so, unless royal license shall have been first obtained.

[The discipline, however, of a standing army, cannot be maintained without the means of punishing military offences more promptly than could be possible by the ordinary tribunals; and the mutiny act, (which invariably and punctiliously recites the illegality of a standing army in time of peace, without the consent of parliament,) by creating courts martial, completes the legal constitution of the army. It specifies military offences, the modes of trying them, the penalties attached to guilt, and the mode of enforcing them: and the crown is empowered to make ARTICLES OF WAR for the better government of the forces, and affecting none but military persons. Thus, it appears that the laws for the government of the army, emanate wholly from the civil power, and may properly be regarded, like the ecclesiastical law, as a distinct division of the civil

* *Parker* v. *Lord Clive*, 4 Burr. 2421.

laws of the realm. There is, however, a great distinction, though often lost sight of, between *military* and *martial* law; the former affecting the troops, or forces, only, to which its terms expressly apply, equally in peace and war, by previously defined regulations; the latter extending to all the inhabitants of the district where it is in force; being wholly arbitrary, and emanating entirely from a state of intestine commotion, or actual war. "Martial law is not, in fact," says sir Matthew Hale, "and reality a law, but indulged, rather than allowed as a law."

[The MARINES are, in point of law, part of the naval force of the realm: but, while serving on board ships of war, are subject to the naval articles of war, and on shore, to articles of war, annually passed for the purpose.

[The MILITIA, as we have seen, volunteers, and irregular forces of all kinds, when embodied for exercise, or active duty, are subject to the articles of war.

[As a standing army is indispensable in India, British officers and soldiers serving there under the East India Company, are subject to an act passed for the purpose, and in force till repealed; while the governments of the three Presidencies are empowered to make laws, and articles of war, for native officers and soldiers.

[In order to preserve the subordination of the military to the civil power, the mutiny acts expressly provide, that nothing contained in them shall exempt any officer, or soldier, from ordinary legal proceedings; and that all officers obstructing the process of civil justice, with reference to any other officer or soldier, shall, on conviction, be *cashiered*, and for ever disabled from holding any civil or military office, or employment, in the kingdom, or under the crown.

[And, lastly, it is perfectly lawful to employ soldiers to preserve the public peace, at home; but this should be done with great caution, and not without an absolute necessity. "Magistrates," said lord chancellor Hardwicke, "have a power to call *any* subject to their assistance to preserve the

peace, and execute the process of the law; and why not soldiers, as well as other men? Our soldiers are our fellow citizens. They do not cease to be so, by putting on a red coat, and carrying a musket." The military act, on such occasions, not *quâ* military, but simply in aid of, and in obedience to, the civil power, which "calls them in," to quote again lord chancellor Hardwicke, "as *armed citizens*, often saving the effusion of innocent blood, and preserving the dominion of the law."]

The ROYAL NAVY of England has ever been its greatest defence and ornament; its ancient and natural strength; the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty.; and, accordingly, it has been assiduously cultivated, even from the earliest ages. [It continues, to the present day, to exercise the anxious solicitude of the nation; and no pains or sacrifice can be too great, to secure our navy's being efficiently and voluntarily manned, by zealous, hearty, and expert sailors.

[The power of "impressing" seafaring men into the royal navy, ever to be reprobated, except in cases of great emergency, is, nevertheless, of ancient and long continued exercise, and its legality has been repeatedly recognised by the legislature. Very recently, however, such inducements to volunteer for the royal navy, have been wisely held out by the legislature, as, it is hoped, may virtually supersede impressment. By stat. 5 & 6 Wm., IV. c. 24, it was enacted that no seaman should be detained, against his consent, for a longer period than *five* years, unless he shall have voluntarily engaged for a longer term. In the year 1853, however, by stat. 16 & 17 Vict., c. 69, the provisions of the former, as amended by the latter act, are extended to men entering, or re-entering the service for *ten* years, or any other term of continuous and general volunteer service, and also to all boys, entering under the age of eighteen years, who are liable to serve till twenty-eight years old; or, if entering

or re-entering when eighteen years old, or upwards, are liable to serve for ten years: and the statement of their age by such boys, is to be accepted as conclusive, subject to punishment as rogues and vagabonds, if their statement be found false. Liberal and salutary provisions are also made, in respect of bounty, pay, and extra-pay, for detention in special emergencies; as well as for securing prompt and easy payment to relations, of sums due to deceased officers and men, both naval and marines, up to the amount of £50, for prize money, bounty, &c.

[The code of regulations for the naval service, is to be found in stat. 22 Geo. II. c. 22, amended by subsequent acts, and by the articles of the navy, analogous to those of the articles of war in the army.*

[It remains to notice a recent and bold reversal of that naval policy, which existed in the time of Blackstone, and to which he, with many great statesmen, before and since his day, attributed our naval mercantile eminence. The Navigation acts, constituting a protective privilege for British shipping and commerce, as against those of foreign countries, have been very recently repealed; and both foreign and British shipping are now placed on the same footing, down even to the coasting trade of the United Kingdom. It is, however, sought to secure a reciprocity by arming the queen with retaliatory powers, by order in council, against those countries, who will not follow our example.—(See 16 & 17 Vict. c. 107, §§ 324, 325, 326, and 17 & 18 Vict. c. 5.)

[Finally, in the year 1854, all former acts regulating our MERCANTILE MARINE, from the 8th Elizabeth, down to the 17 & 18 Victoria, were wholly or partially repealed by "The Merchant Shipping Repeal Act" of that year, (17 & 18 Vict.

* Officers of both services will find, in Mr. Prendergast's "Law relating to Officers in the Army," and "Law relating to Officers of the Navy," two admirable little manuals, comprehending everything relating to their civil and professional rights, duties, and responsibilities.

c. 120,) and in their stead enacted a comprehensive code, entitled "The Merchant Shipping Act, 1854," (17 & 18 Vict. c. 104) divided into Eleven Parts: i. The Board of Trade and its general functions; ii. British Ships, their Ownership, Measurement, and Registry; iii. Masters and Seamen; iv. Safety and Prevention of Accidents; v. Pilotage; vi. Light Houses; vii. The Mercantile Marine Fund; viii. Wrecks, Casualties, and Salvage; ix. Liability of Shipowners; x. Legal Procedure; xi. Miscellaneous Matters, which last part relates to Contracts made with Natives, in India, binding them to go to Australia, and thence to serve in other ships, in the United Kingdom; to the grant of sites for sailors' homes, by the Municipal Corporations of seaport towns; and to empowering Colonial Legislatures to alter the provisions of the Acts, subject to confirmation by Her Majesty in Council.

[In the ensuing year was passed another statute, entitled "The Merchant Shipping Act Amendment Act, 1855," (18 & 19 Vict. c. 91), providing for facilitating the erection and maintenance of Lighthouses in the Colonies, and adding several salutary provisions of a general nature; particularly, extending those in the former act concerning the relief of destitute seamen, of destitute Lascars, and further regulating contracts with Natives in India to go to the United Kingdom, and there serve in other ships, back to India, or elsewhere.

[It remains to be added, that in the year 1856, the legislature (stat. 19 & 20 Vict: c. 41) again evinced its anxiety for the welfare of our seamen, and to encourage habits of prudence and economy among them, by empowering the Board of Trade to establish Savings' Banks for them—a central one in London, with branches at such ports and places in the United Kingdom as the Board may think fit.]

CHAPTER XXXV.

THE FOUR GREAT RELATIONS IN PRIVATE LIFE.

[In a previous chapter* we considered the most universal public relation by which men are connected together,—that of governors, and governed: the tie of government constituting the relation between Sovereign and People. We there, and in subsequent chapters, examined the position and powers of the supreme, and of subordinate magistrates, the latter deriving all their authority from the former; and this led to a review of the various departments of the state, political, secular, ecclesiastical, naval, military, and judicial: the last, however, having to be hereafter more distinctly examined. We have now to deal with the four great relations in private life,—that is, between the people themselves; as first,] that of HUSBAND AND WIFE; which is founded in nature, but developed by civil society,—the one directing man to continue, and multiply, his species; the other prescribing the manner in which that natural impulse must be confined, and regulated. Secondly, that of PARENT AND CHILD; which is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated. Since, however, the parents, on whom this care is primarily incumbent, may be

* Chap. xiii. p. 114.

snatched away by death before they have completed their duty, the law has provided a third relation,—that of GUARDIAN AND WARD: a kind of artificial parentage, in order to supply the deficiency, whenever it may happen, of the natural one. The fourth is that of MASTER AND SERVANT; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. [And in considering this last relation, in its more general form of PRINCIPAL AND AGENT, the ramification of which embraces the whole framework of society, it is instructive to contemplate the manner in which God has made us all, in some way or other, dependent upon, and necessary to, each other, in everything relating to the pleasures and the necessities of life. Of these relations, however, briefly, in their order, in the four ensuing chapters.]

CHAPTER XXXVI.

HUSBAND AND WIFE.

[1 Bla. Com. 433—445.]

THE first private relation of persons, is that of marriage, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law books call them, of "*baron*," and "*feme*." In the consideration of these, I shall in the first place inquire, how marriages may be contracted, or made; next, point out the manner in which they may be dissolved; and lastly, take a view of the legal effects and consequence of marriage. [Though the contract of marriage, by which man and woman are conjoined in the strictest society of life, till separated by death or divorce, is the most ancient, the most important, and the most interesting of the domestic relations, our law considers it simply a civil contract; from which, nevertheless, it differs in one cardinal point, that it is indissoluble at the will of the parties. As, therefore, it is a contract, an action to recover damages for a breach of it, may, as in the case of any other, be brought by either party; and the existence of the contract, proved by witnesses, or from acts and conduct.* Formerly, such a contract might have been specifically enforced; but the legislature (stat. 4, Geo. IV. c. 76, § 27) in the year 1823, rationally forbade so absurd and cruel a procedure.]

* Macqueen, "Husband and Wife," p. 1.

I. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animæ*. And, taking it in a civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and lastly, actually *did* contract, in the proper forms and solemnities required by law.

First, they must be willing to contract. "*Consensus facit nuptias*," is the maxim of the civil law, in this case: and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage, from the canon and civil laws.

Secondly, they must be able to contract. In general all persons are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts: first, such as are canonical; secondly, such as are municipal or civil. The former afford grounds for nullifying a marriage, by the sentence of the ecclesiastical court; on the ground of certain physical infirmities, and [possibly, also, though this is doubtful] that of pre-contract with another person. Till this be done, however, the marriage remains valid. The latter, viz., municipal or civil disabilities, with the single exception of that from want of age, make the contract void *ab initio*, and not merely voidable. Not that they dissolve a contract already formed, but render the parties incapable of performing any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction.

And if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union.

1. The first of these legal (or civil) disabilities is a prior subsisting marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void; polygamy being condemned by both the law of the New Testament, and the policy of all prudent states.

2. The next legal disability, is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marry, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree, and declare the marriage void, without any divorce or sentence in the spiritual court. This disability is founded on the civil law. And, in our law, it is so far a marriage, that, if at the age of consent, they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; for, in contracts, the obligation must be mutual; both must be bound, or neither; and so it is, *vice versâ*, when the wife is of years of discretion, and the husband under.

3. Another incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial, contract, be valid.

[4. Another incapacity is the being within the prohibited degrees of consanguinity or affinity. This ground of objection was, till recently, of merely ecclesiastical cognisance: but by statute 5 & 6 Will. IV. c. 54, it was enacted, that marriages contracted after the passing of it (*i.e.* 31st August, 1835), shall, if objectionable on the ground of consanguinity or affinity, be *absolutely void*, to all intents and purposes.

By statute 32 Hen. VIII. c. 38, it is declared that all persons may lawfully marry, but such as are prohibited by God's law: and that nothing, God's law excepted, shall impeach any marriage, but within the Levitical degrees; the furthest of which is that between uncle and niece. The marriages now illegal, in respect of proximity of degree, are those between persons in the *ascending* and *descending* line, *ad infinitum*, and those to the third degree, inclusive, between collaterals: which last prohibition extends to not only those related by blood, but by marriage. Wherefore a man can marry neither his sister, nor his wife's sister, who are related to him in the second, nor his sister's daughter, nor his wife's sister's daughter, who are related to him in the third degree; but he may marry his first cousin, for she is related to him in the fourth degree. Two brothers may marry two sisters; or father and son a mother and daughter; or a man his wife's brother's widow.]

Lastly, the parties must be not only willing and able to contract, but actually must contract themselves, in due form of law, to make it a good civil marriage. [There are now two modes of legally solemnising matrimony, depending, respectively, on two statutes. The first is that of 4 Geo. IV. c. 76, founded on the principle of the common law, that marriages in England, except in the case of Jews and Quakers, must be solemnised by a minister in holy orders, and according to the rites and ceremonies of the Established Church, as prescribed by the rubric,—by banns, or common or special license. The second is statute 6 & 7 Will. IV. c. 85, amended by subsequent acts, to meet the case of Dissenters, other than Jews and Quakers; and who, as explained in a previous chapter,* may be married without any religious ceremony at all, or with such as they choose to adopt, provided they comply with the regulations of that act, by the certificate of the superintendent-

* Ante, ch. xxxi.

registrar, with or without a license. Neither of these acts extends to royal marriages, or marriages out of England; and when marriage is contracted in Ireland, or Scotland, by British subjects, if valid there, it is held valid here.

[It must be added, that a marriage is not annulled for want of observing the prescribed formalities, unless it were done wilfully, and by *both* parties.]

II. I am next to consider the manner in which MARRIAGES MAY BE DISSOLVED; and this is, by either death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensâ et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before-mentioned; and those, existing before the marriage, as is always the case in consanguinity; not supervenient, or arising afterwards. For, in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*. The issue of it is illegitimate, and the separated parties may respectively marry [other persons] again.

Divorce *a mensâ et thoro, i.e.*—from bed and board,—is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together; as in case of intolerable cruelty on the part of the husband, or adultery in either of the parties. However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted, by act of parliament.

[The difficult subject of divorce has for some years occupied the attention of the legislature, which contemplates important changes in the existing law. In any which may be projected, it is to be hoped that whether the occasion of actions for "criminal conversation" as it is called, be or be not made again an offence,* punishable in our

* In the time of the Commonwealth [A.D. 1650], adultery was made a

temporal courts, such actions, by which a pecuniary compensation is sought by the husband, may be abolished; if for no other reason, because they entail public disclosures of a disgusting, degrading, and demoralising character, attracting to this section of our jurisprudence the contempt of foreign jurists, and the indignation of all the virtue and intelligence of our own community.]

III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are *one person in law:* that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, and protection, she performs everything. *Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage.* I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman, indeed, may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything to his wife by will; for that cannot take effect till the married state shall have been determined by his death. [And during his lifetime he may grant to her, or contract with and for

capital crime. In the dissolute times following the Restoration, men fell into the opposite extreme, and an act of such an unfashionable rigour was not renewed; and ever since, as regards the temporal courts, adultery has afforded to injured husbands, an opportunity of assuaging their anguish by pecuniary compensation.

her, through a trustee.] The husband is bound, by law, to provide his wife with necessaries as much as himself: and if she contract debts for them, he is obliged to pay for them; but, for anything besides necessaries, he is not chargeable [unless he recognise, or ratify her purchase]. Also, if a wife elope, and live with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them be sufficiently apprised of her elopement. If the wife be indebted, before marriage, the husband is bound afterwards to pay the debt [however improvidently contracted, and, though he may have received no portion with her]; for he has adopted her and her circumstances together.*

[If the wife be injured in her person or her property, she can bring no action for redress, without her husband's concurrence, and in his name as well as her own; neither can she be sued, without making the husband a defendant. There is, indeed, one case, where the wife shall sue and be sued as a feme sole, viz. where the husband has abjured the realm, or is banished, for then he is *dead in law*; and, the husband being thus disabled to sue for, or defend, the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. [The husbands and wives of the parties to civil proceedings, in any court of justice, are now competent, and compellable, to give evidence on behalf of either or any of the parties; but the statute effecting this change does not render husband or wife competent or compellable to give evidence, for or against each other, in criminal proceedings, or those instituted in consequence of adultery: nor compellable

* On her death the husband's personal liability would cease altogether, although he might have received a large fortune with her, unless he were sued as an administrator to his wife, in respect of certain rights not reduced by him into possession, during her life-time.

to disclose any communication made to the other during marriage.] But, where the offence is directly against the person of the wife, then, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For, in this case, she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if, by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness to that very fact.

In the civil law, husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and, therefore, in our ecclesiastical courts [and courts of equity] a woman may sue and be sued without her husband.

But though our law in general considers man and wife as one person, yet there are cases in which she is separately considered, as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done by her, during her coverture, are void. [But by statute 3 & 4 Will. IV. c. 74, she may dispose of her real property, by a deed, as if she were a single woman; provided the husband concur, and she produce and acknowledge the deed before one of the fifteen common law judges, or of the commissioners appointed for that purpose; but either a judge or a commissioner must examine her, apart from her husband, to ascertain whether her act be voluntary:—for she cannot be compelled to do it, either by him or anyone else.] She cannot, by will, devise lands to her husband, unless under special circumstances; for, at the time of making it, she is supposed to be under his coercion. [And, except in cases of treason, or murder, if the husband be present when his wife commits a felony, the law mercifully presuming

that she is acting under his coercion, excuses her, and punishes the husband only. This, however, is only a presumption, which may be rebutted by evidence, of which a jury must judge, that the wife was the principal inciter and actor: in which case both, or either may be convicted and punished.]

The husband, by the old law, might give his wife moderate correction: but a wife may now have security of the peace against her husband; or, in return, a husband against his wife. The courts of law will, however, still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour. [A husband has a right to the person and society of his wife, which he may enforce by legal proceedings, unless she have just grounds, such, for instance, as cruelty or profligacy, for withholding them. If she absent herself without any misconduct on his part, he may retake her by stratagem: and if she express her intention again to leave him, he may restrain her of her liberty, till she is willing to return to her conjugal duties.* "When people understand that they *must* live together," said a great judge, "except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness and estrangement from their common offspring, and in a state of most licentious and unreserved immorality. In this case, as in many others, the happiness of some

* *In re Cochrane*, 8 Dow. P.C.

individuals must be sacrified, to the greater and more general good."]*

These are the chief legal effects of marriage, upon which we may observe, that even the disabilities of the wife, are for the most part intended for her protection and benefit.

* Lord Stowell, 1 Consist. Rep. 35—36.

CHAPTER XXXVII.

PARENT AND CHILD.

[1 Bla. Com., pp. 446—449.]

THE second, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

Children are of two sorts; legitimate, and illegitimate; each of which we shall consider in their order; and, first, of legitimate children.

I. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. *Pater est quem nuptiæ demonstrant*, is the rule of the civil law; and this holds, with the civilians, whether the nuptials happen before, or after the birth of the child. With us in England, however, the rule is narrowed, for the nuptials must be precedent to the birth: [The reason of the English is much superior to that of the Roman law, in this particular:—it being one main end of marriage to ascertain some person to whom the care, the maintenance, and the education of the children should belong; and this end is undoubtedly better attained by legitimating, as with us, all issue born after wedlock, than by legitimating, as in the Roman law, all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues.*

* *Doe* v. *Vardell*, 6 Bing. N.C. 383 (in the house of lords); 2 Steph. Com. 277.

From the remotest period of its history, our law has considered children born before marriage, illegitimate; and it has been recently solemnly decided, that even when born in a foreign country, the law of which allows such children to be legitimate, they are nevertheless incapable of inheriting land in England.] At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. The power of such parents over their children. 3. The duties of such children to their parents.

1. And, first, the duties of parents to legitimate children principally consist in three particulars: the maintenance, protection, and education of them.

i. The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they gave their children life, only that they might afterwards see them perish.

It is a principle of our own law, that there is an obligation on every man to provide for those descended from him; and the manner in which this obligation shall be performed is thus pointed out. The father and mother, grandfather and grandmother, of poor persons not able to work, shall maintain them at their own charges, if of sufficient ability.

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, through either infancy, disease, or accident; and then he is obliged to find them with necessaries only. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours.

Our law has made no provision to prevent the disinheriting of children by will: * leaving every man's property in his own disposal, upon a principle of liberty, in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound [if of ability to do so] to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs, also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions, to take away the right of an heir.

ii. From the duty of maintenance, we may easily pass to that of protection, which is also a natural duty, but rather permitted, than enjoined, by any municipal laws: nature, in this respect, working so strongly as to need rather a check, than a spur. A parent may, by our laws, maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery [and even homicide itself, in the necessary] defence of the persons of his children.

iii. The last duty of parents to their children is that of giving them an education, suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglect his culture and education, and suffer him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a

* The civil law would not allow a parent to disinherit his child, without giving a valid reason for doing so: and if he gave a bad one, or a false one, the child might set the will aside.

proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children: and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. Though the rich, indeed, are left at their own option, whether they will breed up their children to be ornaments, or disgraces, to their family; [yet the religious, moral, and intellectual training of the humbler classes, though not compelled, in this country, is nevertheless, encouraged and promoted by large annual parliamentary grants of money, placed at the queen's disposal, "for the purpose of promoting the education of the poor in Great Britain."*]

2. The power of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble, in the faithful discharge of it. And upon this score the municipal laws of some nations, have given a much larger authority to the parents, than those of others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave, had also the power of taking away. But the rigour of these laws was softened by subsequent constitutions; so that we find a father banished by the emperor Hadrian for killing his son, though he had committed a

* See Stat. 7 & 8 Vict. c. 37; and 2 Steph. Comm. 285.

very heinous crime, upon this maxim, that *patria potestas in pietate debet, non in atrocitate, consistere.* But still they maintained, to the last, a large and absolute authority: for a son could not acquire any property of his own, during the life of his father; but all his acquisitions, or at least the profits of them, belonged to the father for his life.

The power of a parent, by our English laws, is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner: since this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child, under age, is also directed by our law to be obtained; [for in case of such a marriage without licence, the declaration of the father's dissent will nullify the proceedings; nor can any such licence be granted, except upon oath that either such consent has been obtained, or that the parties are of age].

The legal power of a father over the persons or property of his children, ceases at the age of twenty-one: for they are then enfranchised, by arriving at years of discretion, or that point which the law has established, as some point must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet till that age arrives [or till their marriage], this empire of the father continues, even after his death: for he may, by his will, appoint a guardian to his unmarried children. He may also delegate part of his parental authority, during his life, to the tutor, or schoolmaster, of his child; who is then *in loco parentis,** and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed. [The mother has no legal power

* See this beautifully expressed by Juvenal.

"Dii! majorum umbris, tenuem et sine pondere terram,
Spirantesque crocos, et in urnâ perpetuum ver,
Qui præceptorem sancti voluêre *parentis*
Esse *loco!*"

over her child, in her husband's life-time, as against him, unless, where the child is under seven years of age, the chancellor or master of the rolls order the husband, or testamentary guardian, to deliver the child into her custody, provided she be not of profligate character. After her husband's death, she is, as he was, entitled to the custody of the infant, till twenty-one; but cannot appoint a testamentary guardian.]

3. The duties of children to their parents, arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws.

The law does not hold the tie of nature to be dissolved, by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental piety [provided he be poor, old, blind, lame, or unable to work, to such an extent as may be deemed reasonable by the proper authorities. The relatives so compellable, are the father and grandfather, mother and grandmother, or children, of a pauper.*]

II. We are next to consider the case of illegitimate children; which, by our laws, are those born out of lawful matrimony. The civil and canon laws, as has been seen in the preceding chapter, do not allow a child to

* Stat. 43 Eliz. c. 2, § 7. Ante, p. 131.

remain illegitimate, if the parents afterwards intermarry: and therein they differ materially from our law; which makes it an indispensable condition, to make such a child legitimate, that it be born after lawful wedlock. [It was the attempt to introduce into our law this one of the civil and canon laws, which occasioned that famous passage in our history, where the peers, at the parliament of Merton, refused to do so, in the memorable declaration (20 Hen. III. c. 9.)—"*Et omnes comites et barones, unâ voce responderunt, quod* NOLUNT LEGES ANGLIÆ MUTARE *quæ huc usque usitatæ sunt, et approbatæ.*"]

3. The rights of an illegitimate child are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody: and sometimes called *filius nullius*, sometimes *filius populi*. Yet he may gain a sirname by reputation, though he has none by inheritance. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree; and yet the civil law, so boasted of, for its equitable decisions, made such children, in some cases, incapable even of a gift from their parents. An illegitimate child may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise: as was done in the case of John of Gaunt's children, by a statute of Richard II.* [The mother of an illegitimate child appears entitled to its custody, in preference to its putative father; and is bound to maintain it till she be married, when the burthen is attached to her husband, or till the child be sixteen, or gain a settlement in its own right, or, if a female, be married. If the mother, being able, neglect this duty, she may be punished as a vagrant: but if unable, certain steps are pointed out by the legislature, by which the putative father may be compelled to maintain his illegitimate offspring.]

* Ante, p. 180.

CHAPTER XXXVIII.

GUARDIAN AND WARD.

[1 Bla. Com. 460—466.]

The third general private relation is that of guardian and ward; which bears a near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent,—that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall consider first the different kinds of guardianships, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

Of the several species of guardians, the first are *guardians by nature:* viz. the father, and, in some cases, the mother of the child. For if an estate be left to an infant, the father is, by common law, the guardian, and must account to his child for the profits. And, with regard to daughters, it seems, by construction of the statute 4 & 5 Ph. & Mar. c. 8, that the father might, by deed or will, assign a guardian to any woman-child under the age of sixteen; and if none be so assigned, the mother shall be guardian. There are also *guardians for nurture;* which are, of course, the father or mother, till the infant attain the age of fourteen years. [These two guardianships extend to the person

only, of the ward.] Next are *guardians in socage* who are also called guardians by the common law [and are such of both person, and estate]. These took place only when the minor was entitled to some estate in lands; and when, by the common law, the guardianship devolved upon his next of kin, to whom the inheritance could not possibly descend. [Since statute 3 & 4 Will. IV. c. 106, however, there is no kinsman who cannot inherit. Guardianship in socage seems therefore to be now *legally*, as it was long ago *virtually*, obsolete.] These guardians in socage, like those for nurture, continue [if still in existence], only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24; which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship in chivalry, which lasted till the age of twenty-one, enacts that any father, under age, or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attain the age of one-and-twenty years. These are called guardians by statute, or testamentary guardians. [This species of guardian, confined to the father, does not extend to illegitimate children. Now, however, if in such a case, a father have named a guardian, the court of chancery will appoint such person guardian: and, if applied to on behalf of either a legitimate or an illegitimate child, for whom no guardian has been named, will appoint one, for the protection of both person and property. And an infant becomes a ward of the court of chancery, simply on the institution of a suit there, relating to his property: but this cannot be, in the case of an infant who has no such property.]

The power, and reciprocal duty, of a guardian and ward are the same, *pro tempore*, as that of a father and child;

and therefore I shall not repeat them: but shall add only, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuse his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.

2. Let us next consider the *ward*, or person within age, for whose assistance and support these guardians are constituted by law; or who it is that is said to be within age. The ages of male and female are different, for different purposes. A male, at twelve years old, may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, and choose his guardian; and at twenty-one is at his own disposal, and may aliene his lands, goods, and chattels. [But an infant cannot now make a valid will, (statute 7 Will. IV. and 1 Vict. c. 26, s. 7,) nor act as a sole executor.] A female, at twelve, is at years of maturity, and therefore may consent or disagree to marriage; at fourteen is at years of legal discretion, and may choose a guardian; and at twenty-one may dispose of herself and her property. So that full age, in male or female, is, twenty-one years; which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law. [As the law, in general, does not take notice of

the fraction of a day, if a person be born on the 1st day of January, he is of age on the morning of the last day of December, though he may not have lived twenty-one years, by nearly forty-eight hours.]

3. Infants have various privileges, and disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued, but under the protection, and joining the name, of his guardian; who is to defend him against all attacks, as well by the law as otherwise: but he may, by leave of the court, sue, either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be, any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of fourteen years may be capitally punished, for any capital offence; but under the age of seven he cannot. The period between seven and fourteen is, indeed, subject to much uncertainty: for the infant shall, generally speaking, be judged *primâ facie* innocent; yet if he were *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he has not attained to years of puberty or discretion. And sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy, still younger, that had killed his companion, and hidden himself, who was hanged; for it appeared by his hiding, that he knew he had done wrong, and could discern between good and evil; and in such cases the maxim of law is, that *malitia supplet ætatem*. [By this is to be understood, that between the years abovementioned, the ordinary legal presumption of *doli incapax*, may be rebutted by strong and pregnant evidence of a mischievous discretion: such as would clearly convince a jury,

that at the time of committing the offence, the child had a guilty knowledge that he was doing wrong. By the word *malitia*, in the maxim quoted, is signified, the doing a wrongful act intentionally, without just cause, or excuse.]*

So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With regard to estates and civil property, an infant has many privileges. It may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches*, or negligence, be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still, to all these rules there are some exceptions: part of which were just now mentioned, in reckoning up the different capacities which they assume at different ages; and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, though it is true, that infants cannot purchase or aliene estates [except subject to the transaction being avoided on their arriving at full age,—yet, by a recent statute (13 & 14 Vict. c. 60, ss. 7, 20), the court of chancery may make an order, vesting lands possessed by infant mortgagees or trustees, as it may direct, or appoint a person to convey the property, as if the infant had done so when of full age]. Also, though generally true, that an infant can do no legal act, yet an infant, who has an advowson, may present to the benefice, when it becomes void: for the law, in this case, dispenses with one rule, in order to maintain others of far greater consequence; it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than either

* See Mr. Broom's excellent "Treatise on Legal Maxims," p. 233 (2nd ed.).

suffer the church to remain unserved till the infant comes of age, or permit the infant to be debarred of his right, by a lapse to the bishop, [which would be the result of a failure to present in due time.

[An infant, though disabled from doing so many acts on his own account, may yet act effectually, as an agent, for one who may have chosen to appoint him such. He cannot be a juror, but may be a witness, in cases of even the greatest moment, civil and criminal, and though of very tender years, provided the court be satisfied of his intelligence, and knowledge of the obligation of an oath. And, generally, it may be stated,* with reference to contracts entered into by infants, first, that all such as the court can pronounce to be prejudicial to him, are void;—secondly, all those which it can pronounce to be beneficial to him, are valid; and lastly, those which do not distinctly fall under either head, are voidable by himself, at his election. Under the first class is, a contract to pay a penalty; under the second, a contract of apprenticeship, or for necessaries,—food, clothes, or education; under the last, a contract for goods, which are not necessaries, or a lease made to, or by him. While thus protected, however, against being defrauded in respect of contracts, he is liable, as we have seen, at a very early age, for crime, or civilly, for a tort, as it is called (*i.e.*, a wrong unconnected with contract)—as for slander, libel, or assault.]

* See 2 Steph. Comment. pp. 298—300, and 2 Kent Com. 193.

CHAPTER XXXIX.

MASTER AND SERVANT.—PRINCIPAL AND AGENT.

[1 Bla. Com. 423—432.]

[THE relation of master and servant is, we have seen, founded in convenience; whereby a man is directed to call in the assistance of others, when his own skill and labour will not be sufficient to answer the cares incumbent upon him. In order to appreciate this most extensive relation, that between the employer and the employed, it will be useful to premise a little concerning PRINCIPAL and AGENT; the doctrines of which are substantially the same, whatever the nature of the affairs to which they are applied.

[In the expanded intercourse of modern society, it is easy to perceive, that the exigencies of trade and commerce; the urgent pressure of professional, official, domestic, and other pursuits, and avocations; the temporary existence of illness or infirmity; the necessity of transacting business, at the same time, in various, and remote places; and the importance of securing *integrity, ability,* and speed in conducting the concerns of life,—all these must require the assistance of many persons, besides the immediate superintendence of him whose rights and interests are to be directly affected by the results. The Roman law thus tersely expressed the same: *Usus Procuratoris perquam necessarius est, ut qui rebus suis ipsi superesse vel nolunt, vel non possunt, per alios possint vel*

agere vel convenire.—Subject to very few exceptions, whatever a man *sui juris*, may do himself, he may do by another; and as a correlative of this maxim, whatever is done by that other, is done by his employer. Hence the fundamental maxim, *Qui per alium facit, per seipsum facere videtur;* i.e., he who does an act through the medium of another, is, in law, considered as doing it himself,* a maxim, as the late learned chief justice Tindal observed,—"which is of almost universal application."† Due reflection on this doctrine, will lead to an appreciation of rights and duties of the most critical character, in any species of the relations and affairs of life.

[Every Agent must be regarded, as to his sayings and doings in that character, as though he were the principal himself, speaking with his own lips, writing with his own hand, and acting, or abstaining from acting, as would his principal; but subject to this capital condition, that the agent be speaking, writing, and acting, pursuant to, and within the scope of, the authority delegated to him by his principal: otherwise no man would dare to employ an agent. Hence a principal should consider well the discretion and fidelity of him whom he proposes to put in such a responsible position; and the agent himself should be similarly circumspect, lest he not only injure or ruin his principal, but expose himself, to injurious and ruinous liability; and further than this, again, it behoves third parties to be cautious while dealing with an agent, lest they also be injured or ruined, by negligently or hastily assuming an agent to be acting within the scope of an authority, which he is, in fact, very far exceeding.

[The first question to be answered is,—whether the relation of Principal and Agent exist, in fact? And this must depend upon the evidence afforded by either a written appointment, definite and precise; or implied from circum-

* See Mr. Broom's "Legal Maxims," p. 643, and "Story on Agency," p. 2.

† 8 Scott, N. R. 830.

stances,—from the position of the parties, their previous relations and dealings, or some custom prevalent among particular classes of mercantile and other persons. As with the fact of the relationship, so is the nature, extent, and duration of the authority entrusted to the agent: all these being matters often very difficult to determine, alike by principal, agent, and third parties. Therefore it is, that honesty, discretion, and vigilance, are qualities which all ought to possess, who are parties to such a relation, if its results are expected to be satisfactory and safe. It should be seen whether the alleged agent be really such; what is the scope of his authority, and how it can be ascertained; how it ought to be exercised; and how long it lasts; whether, for instance, it cease simply from the operation of altered circumstances: by act of law: by the principal's revocation, or the agent's renunciation: by the bankruptcy, insanity, marriage, or death of either, or both, principal and agent. What is to be done, again, in a sudden emergency, unforeseen by either party, and when they have no opportunity of consulting each other, and yet must act? When may a principal adopt an unauthorised act of his agent? When is an agent personally, or a principal civilly, or even criminally, liable for the acts of his agent? These are the occasions of almost half the litigation of modern times; no little of which might be avoided by adequate vigilance and circumspection, by every kind of agent: attornies: auctioneers: bailiffs: brokers: factors: consignees: ship-captains: partners: clerks: servants. A partner affords an interesting illustration of the doctrines which we have here been indicating: for in a partnership, each member of the firm is the accredited AGENT of the rest, whether they be active, nominal, or dormant; and, as such agent, has authority to bind them, by either simple contracts respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing *bonâ fide*.

[The object of affording a glimpse of this vast head of law, is to show the necessity of even laymen, attending to general, and perfectly well settled principles, regulating a relation, with which no one can at all times dispense, and the operation of which often entails sudden, serious, and *avoidable* responsibility, trouble, and danger. Let us now, however, come to that species of principal and agent, which is indicated by the words, *Master* and *Servant*.

[It has been already explained] that pure and proper slavery does not, nay cannot, subsist in England: such, I mean, as gives an absolute and unlimited power to the master over the life and fortune of the slave. It is, indeed, repugnant to reason and the principles of natural law, that such a state should subsist anywhere. It is laid down, as we have seen,* that a slave, the instant he lands in England, becomes a free man: that is, the law will protect him in the enjoyment of his person and his property. A celebrated edict under Louis XVI. is prefaced by a solemn declaration, that "Labour is the poor man's property; that no property is more sacred; and, that neither time nor authority can sanction the violation of his right freely to dispose of this, his only resource." The general rule in this country also, is, that all have a property in their own labour; but to this there are certain exceptions. The earnings of married women, belong to their husbands; of children, to their parents; of apprentices, to their masters or mistresses: of convicts, to the public; and those of paupers, to the community by which they are maintained. In this last instance, indeed, labour as will be hereafter explained, is imposed as a test of destitution, for the very purpose of protecting the property of the industrious, in their own labour, as well as all other property, from being consumed by the able-bodied idle. Subject to these just exceptions, every British subject has a

* Ante p. 97.

right to the fullest advantage derivable from his own labour—to bestow it where, as, where, for whom, and for what return, he pleases. Both masters and men are now free to combine together (stat. 6 Geo. IV. c. 129) respectively, for the purpose of peaceably determining what wages the one will give and the other accept, for labour, and under what conditions it shall be bestowed or accepted; but care must be taken not to abuse this right, with a view to intimidation, dictation, or coercion, which is illegal alike in masters and workmen. Labour being thus free, it is a general rule,* that any man who bestows his labour for another, has a right of action to recover compensation for it, subject to the two exceptions of physicians and barristers, whom the law fastidiously supposes to act with a view to only honorary reward. [They, too, however, may maintain actions to recover compensation for their services, provided they deem it consistent with their position to make, beforehand, an express agreement for such compensation.]† *Primâ facie*, therefore, all labour done for another, at his instance, expressly or impliedly, (for no mere voluntary courtesy or service can establish the relation of debtor and creditor, in respect of it,) and of which he takes the advantage, must be paid for, unless he can prove that it was not.

[There are four classes of servants: domestic servants; labourers; apprentices; and others of a superior class which will presently be specified.

[I. The first sort of servants acknowledged by the law of England, are DOMESTIC SERVANTS, called ordinarily "menial," from living *intra mœnia:* but it is not absolutely necessary that the servant should, to be entitled "menial," live actually under the master's roof, or in a part of his dwelling-house. A head gardener, for instance, living in a separate house, rent free, with yearly wages, and having several inferior gardeners under him, comes so far under the

* *Per curiam*, *Poucher* v. *Norman*, 3 B. & C. 744.

† See *Veitch* v. *Russell*, 3 Q. B. 928.

designation of a menial servant, that he may be discharged on a month's notice.* On the other hand, persons may live *intra mœnia*, and yet be by no means subject to the incidents annexed to menial servants, with reference to dismissal; as is the case of secretaries, librarians, stewards, clerks of various kinds, tutors, and governesses. If engaged generally,† as far as relates to time, it may be construed as a contract for a year, especially if the salary be payable yearly, or quarterly. It was recently decided that a governess, engaged at a yearly salary, was not dismissible as a domestic servant; the court saying, "the position which she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that held by a mere menial or domestic servant. As matter of law, therefore, a governess does not fall within the rule of a month's wages, or warning."‡ In these cases, also, a cause of immediate dismissal must be serious and substantial, involving moral misconduct, or wilful or habitual disobedience or negligence.

[The contract of a menial servant arises upon the hiring: and if no fixed period of service be agreed on, and nothing said, but about the rate of wages, the law construes it to be a hiring for a year, subject to the right of either party to terminate the contract at pleasure, by giving, the one a month's wages, the other a month's "warning," or notice of quitting at the end of a month. This contract cannot be terminated earlier or otherwise by either party, without lawful cause, which must not depend upon whim, or caprice. Moral misconduct, habitual neglect, or deliberate, and

* *Nowlan* v. *Ablett*, 2 C. M. & R. 54. The jury, on these facts, expressly found that the gardener was a menial servant, and the court held that their verdict was right.

† A contract of hiring and service need not be made in writing, unless it must extend beyond a year; in which case the Statute of Frauds is applicable.

‡ *Todd* v. *Kerrick*, 8 Exch. 151.

therefore wilful disobedience, renders the servant liable to instant dismissal, without any wages at all, if such dismissal occur during a current quarter; for the servant's misconduct alone has prevented his continuing in the service long enough to earn the wages due at only stated periods: in legal language, an entire contract cannot, under these circumstances, be "apportioned," and in favour of the wrong-doer.—A servant, on the one hand, impliedly promises to obey all his master's lawful and reasonable orders, fairly within the scope of his employment, and the master, on the other, impliedly promises to issue none other than such orders. The latter, moreover, is not impliedly liable for an injury sustained by a servant, while acting in obedience to his master's orders,* nor to provide him with medicine, or surgical attendance. Nor is a master bound to give his servant a character, to any one applying for it; but if he do, it must be a true and just one. If, however, he give a character disparaging to the servant, but *bonâ fide*, under an impression of its truth, he is not liable to an action by the servant, because it was, as the law calls it, a privileged communication: that is, one made on such a lawful occasion, as tends to rebut the *primâ facie* inference of malice, otherwise springing from a statement derogatory to private character. To sue his master for damages, the servant must establish a case of not only falsehood, but of malicious motives, of which a jury must judge. If a master discover that he has given an undeserved good character to a servant, who obtains, by means of it, a new place, the old master is bound to inform the new one. Finally, to protect masters from the consequences of being imposed upon by false characters, statute 32 Geo. III. c. 56, renders both the giver and the obtainer of such liable to a fine of 20*l*. and in default, to imprisonment with hard labour, for not less than one month, nor more than three.

[II. A second species of servants, are LABOURERS, whether

* See *Skip* v. *E. C. Railway Co.*, 23 L. J. (N.S.) 23 C.P.

in husbandry, manufactures, or otherwise, not living *intra mœnia*, as part of the family. These are engaged, usually, by the day, or week: but if no time be specified, and the wages "are so much," or, "at the rate of" so much *per annum*, it is regarded as a yearly hiring; on a principle of natural equity, with reference to servants in husbandry; that the servant shall serve and the master maintain him, throughout all the revolutions of the respective seasons: as well when there is work to be done, as when there is not. The hiring depends of course upon the expressed will of the parties, at the time, or the custom which may prevail in the locality. There is no such practice in the case of husbandry, as of domestic, servants, with reference to a month's warning, or a month's wages. Various statutes empower justices of the peace to compel persons not having any visible means of livelihood, to go out to service in husbandry, or certain specific trades, and to adjust disputes which may arise between them, and their masters.

[III. A third species of servants are called APPRENTICES (from "*apprendre*," to learn); and are usually bound by indenture, but not necessarily so, for a term of years, to serve their masters, and be instructed by them.

[The system of apprenticeship, is said by a great authority,* to have been wholly unknown to the ancients: that there is not a trace of it to be found in the Roman law, nor any Greek or Roman word expressing the idea which we now annex to the word apprentice. Others,† however, conceive the relation thus created to be of very ancient origin, and the reciprocal rights and duties involved by it, greatly to resemble those of Parent and Child; for the master is entitled to the whole produce of his apprentice's labour, and may, in case of disobedience to his lawful orders, or for detected immorality, inflict moderate corporal chastisement, on a male infant, as a father on his child,

* Adam Smith, "Wealth of Nations," book I. c. 10.

† Smith's "Mercantile Law," book III. c. 10.

or a schoolmaster on his pupil; the right to do so, arising in each case out of the *patria potestas*, the delegation of which has been, in all ages, allowed for the sake of the good government and education of young persons. This power the master cannot delegate. The contract of apprenticeship is one of those by which a person under age is permitted, by law, to bind himself, on the general ground adverted to by lord Mansfield, that "if an agreement be for *the benefit* of an infant, it shall bind him." He may, indeed, elect to avoid the agreement, at his full age, or even while under age, if it be *manifestly* for his benefit so to do. If the apprentice himself do not execute the instrument of apprenticeship, it will not be binding.

[Since the time of Elizabeth, till a recent period, it was necessary to serve a seven years' apprenticeship before any trade could have been exercised in England: but this rule was entirely abrogated by the Municipal Corporation Act, in the year 1835. In ordinary cases, apprenticeships are voluntary; but this is different with parish apprentices, as they are called—the children of poor persons. Till recently, persons could be compelled to receive such apprentices; but this practice also has been abrogated, by statute 7 & 8 Vict. c. 101, s. 13. The rights and liabilities of these masters and apprentices, are carefully regulated by many statutes; and it may suffice here to say, that the Poor Law Commissioners have a general superintendence in these matters. Justices of the peace can also settle disputes in such cases, and even terminate, as indeed they may in all cases, for proper cause, the contract of apprenticeship.—A recent shocking case* of cruelty, led to the passing of the statute of 14 & 15 Vict. c. 11, which, reciting that it was expedient to make provision for the better protection of persons under the care and control of others, as apprentices or servants, enacts, that the neglect, wilfully, and without lawful cause, to provide for such, necessary

* *Regina* v. *Sloane.*

food, clothes, or lodging; or unlawfully and maliciously assaulting them, whereby their lives shall be endangered, or their health actually, or likely to be, permanently injured,—shall be a misdemeanor punishable with imprisonment, for a period not exceeding three years, with or without hard labour. It must further be stated that the legislature, in a beneficent spirit, has, with increasing energy and frequency, interfered to secure the rights of servants as against their employers, especially in the case of persons of tender age, and of the female sex; and when employed in unhealthy or dangerous callings, in mills, mines, and otherwise, and exposed to excessive labour: and to prevent frauds on the part of masters, in the payment of wages to their servants.

[IV. A fourth species of "servants," is of a superior order —that of agents, stewards, bailiffs, factors, brokers, clerks, commercial travellers, tutors, governesses, and others employed in analogous capacities, as already glanced at. In these cases, a general engagement (*i.e.* without mention of time), at a yearly salary,—or, "at the rate of" so much *per annum*, is taken, *per se*, to be an engagement for a year certain, with all its legal incidents as to continuance or termination: but the presumption of a yearly hiring, may be rebutted, by evidence that such was not the intention of the parties. Thus, a general hiring at *weekly* wages, or at so much *per week*, "for so long as the master shall want a servant," or "for so long as they shall agree," are only weekly hirings, in the absence of any other circumstances casting light on the intended duration of the contract. If any facts show, however, that the parties intended a yearly hiring, a reservation of wages payable at shorter intervals, will not controul it. Thus, where the contract was to serve "for 4*s*. 9*d*. a week," or "at the rate of 4*s*. a week," with liberty of parting, on a month's notice from either, this was held to be a hiring for a year, on this principle:—that the mention of *a month*, showed that the stipulation for *weekly* wages was not intended to limit the duration of the contract.

The presumption, therefore, of its having been intended for a year, remained unrebutted.—Such seem the general principles applicable to those cases incessantly occurring, where the parties may have chosen to enter verbally, and hastily, into contracts of such considerable importance, and to express them vaguely and loosely; thereby placing each at the other's mercy, the moment that opportunity or inclination may induce either to become hostile. It is greatly to be regretted that any one should engage another in such a responsible capacity, otherwise than deliberately, and with a written specification of terms. To this it may be added, that the happy and advantageous continuance of this relation, depends upon the good sense, good temper, good faith, and forbearance, of both parties.]

It remains to notice some of the leading incidents of this relation between master and servant, as regards the acts of either towards *third parties*.

The master may assist his servant, in an action at law, against a stranger, without infringing the law forbidding "maintenance." So a master may obtain damages for beating or maiming his servant, against a stranger, whose act has deprived the master of his servant's service: a loss which must be proved upon the trial. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by, and defend, his master. Also, if any person hire or retain my servant, being in my service, for which the servant departs from me and goes to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know the servant to be mine, no action lies; unless he afterwards refuse to restore me my servant, upon information and demand. The reason and foundation upon which all this doctrine is built, seems to be

the property that every man has [not in the person, but] *in the service*, of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: on the great principle already enunciated, *qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is, at the same time, to obey his master in matters only that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet.* [This might, however, be otherwise, if the guest were guilty of gross negligence, or the thieves were his own companions or servants. The innkeeper is also liable for any loss or injury arising *pro defectu hospitatoris, vel servientum suorum*: and the loss or injury, itself, will be presumptive evidence of negligence.] Likewise, if the drawer at a tavern sell a man bad wine, whereby his health is injured, he may bring an action against the master: for, although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is, impliedly, a general command. [This, however, does not prove that the servant, also, may not be personally liable for the fraud of which he is *personally* guilty.]

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command on the part of the master. If I pay money to a banker's servant, the banker is answerable for it: but if I pay it, for instance, to a clergyman's or a

physician's servant, whose usual business it is not to receive money for his master, and the servant embezzle it, I must pay it over again. If a steward let a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that are accustomed to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this, no mutual intercourse between man and man, could subsist with any tolerable convenience. [The maxim, *respondeat superior* (*i. e.* let the principal be answerable) is but another form of that other, *qui facit per alium, facit per se.*] If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish, when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence, do any damage to a stranger, the master shall answer for his neglect. If a smith's servant, for instance, lame a horse while he is shoeing him, an action lies against the master. But in these cases the damage must be done while he is actually employed in the master's service: otherwise the servant shall answer for his own misbehaviour. [The case, however, is altogether different with reference to crimes, or *wilful* injuries, committed by a servant without his master's consent or encouragement, although in the course of employment as servant. Were it otherwise, the relation of master and servant would be annihilated. No one would dare to employ a servant: for in crimes, and "*torts*" (as the law calls wrongs unconnected with contracts) *all are principals*, and

as such personally liable for their acts. The relation of neither parent and child, nor of master and servant, will excuse, or extenuate, the commission of any crime, of whatever denomination; for the command to commit a crime is void in law, and can protect neither the commander, nor the instrument.* The general rule as to a master's liability for the wrongful act of his servant, cannot be expressed better, or more instructively, than in the well-considered language of the court of exchequer, in a recent case.† "On that principle, *qui facit per alium, facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer: he who had selected that wrong-doer as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."]

We may observe, that, in all the cases here put, the master may be frequently a loser, by the trust reposed in his servant, but can never be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon, in law, as the wrong of the master himself: and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong. [Thus have been laid down, plainly and intelligibly, some of the fundamental principles regulating the great relation of principal and agent, one interesting and important to, as affecting, almost everybody, in every rank of life. They are worthy of careful and frequent reflection, for practical guidance; shedding clear light on transactions apparently hidden in intricacy and darkness.]

* 1 Hale, P.C. 44, 516; 4 Bla. Com. 28; Brown's Maxims, 11 (2nd. ed.).

† *Quarman* v. *Burnett*, 6 M. & W. 509.

CHAPTER XL.

THE POOR.

[1 Bla. Com. 359, *et seq.*]

[*IF there be among you a poor man of one of thy brethren, within any of thy gates, in thy land, which the Lord thy God giveth thee, thou shalt not harden thine heart, nor shut thine hand, from thy poor brother: but thou shalt open thine hand wide unto him, and shalt surely lend him sufficient for his need, in that which he wanteth . . . Beware lest thine eye be evil against thy poor brother, and thou givest him nought, and he cry unto the Lord against thee, and it be sin unto thee. Thou shalt surely give him, and thine heart shall not be grieved when thou givest unto him: because that for this thing the Lord thy God shall bless thee in all thy works, and in all that thou puttest thine hand unto. For the poor shall never cease out of the land: therefore I command thee, saying, thou shalt open thine hand wide unto thy brother, to thy poor, and to thy needy in thy land.**

[Such was the divine command to the Jewish nation: enjoining a duty, and its willing performance, with a threat of evil, in case of non-observance; a promise of good, in return for obedience; and an assurance that the occasion for such obedience, should never cease. Ages afterwards,

* Deuteronomy xv. 7—11.

our Saviour, also, solemnly reminded those whom he addressed, *ye have the poor always with you:** by these few pregnant words, enjoining a constant and hearty performance of the duties prescribed to the chosen people of old.

[These obligations, it is needless to say, are recognised by a Christian state like that of England; which feels, nevertheless, difficulty in ascertaining the extent of such obligations, and the mode of effectually discharging them: indiscriminate and lavish bounty being seen to induce at least as serious evils, as its opposite extreme. The great object of the Poor Laws of England, is to dispense adequate relief to the impotent and deserving poor, without affording encouragement to the idle and undeserving. While humanity and religion prescribe the succour of the destitute, nothing can be more unreasonable, unjust, and prejudicial to the public interest, than to compel the industrious part of the community to maintain those who, though able, are unwilling to labour:† and those must surely be deficient in foresight, as well as justice, who, in the words of Blackstone, suffer one half of a parish to continue dissolute and unemployed, and are at length amazed to find, that the industry of the other half is not able to maintain the whole.

[Passing from the moral duty of a voluntary, to the legal duty, with which alone we are here concerned, of a compulsory, relief of the poor, the latter will be found liable to a two-fold practical difficulty: to ascertain who are the proper recipients of such relief, and who are bound to bestow it.—In a general way, the answer to the former question is not difficult, resting, as it does, on the surest grounds of humanity; viz. those should be relieved, who are unable to work, if they had the opportunity, and those who though able and willing, yet cannot find work to do. The law of God and man forbids that either of these classes

* Matt. xxvi. 11. † 3 Steph. Com. 176.

should perish. About the slothful and dissolute poor, who can work but will not, we need give ourselves here no concern, except so far as to say, that it is not easy to devise and apply fitting tests of such a condition: yet this is one of the greatest problems to be solved by an equitable, and even a safe, system of poor laws. The attempt to do so was made by the legislature in the year 1834,* which constitutes an epoch of no small importance, in our modern social economy.

[The intricacy and obscurity of our Poor Laws have been long proverbial; harassing the legal profession by their difficulty, and the public by ruinous litigation. For general purposes, and especially those of the learner, it must suffice to say, that four words represent the four great features of that law, and corresponding sources of social, legislative, and legal perplexity:—RELIEF; SETTLEMENT; REMOVAL; RATING. All these may be resolved into the two questions above-mentioned, viz. who ought to be relieved? and, who are bound to relieve?

[In forming a judgment concerning the spirit of ancient legislation, it is of course essential, in all cases, to consider carefully the circumstances of the times; and in that relating to the poor, our ancestors have for many centuries experienced the difficulties which, modified by social changes, continue to harass their descendants. Among the many great ameliorations, (says one who has written excellently on this difficult and important subject,)† introduced by Christianity into the manners and laws of the Roman world, that which concerned the relief and support of the poor, holds a prominent place. What is now emphatically called Christian charity,—man's *love of his neighbour*,—‡ may

* By Stat. 4 & 5 Will. IV., c. 76, passed 14 August, 1834.

† The reader who wishes to obtain a luminous account of such matters, by one whose researches and professional experience have qualified him for the undertaking, is referred to Mr. Pashley's "Pauperism and Poor Laws," (A.D. 1852,) where may be found at large, the substance of much that follows.

‡ Ante, p. 2.

be said to have been unknown in ancient Rome, until Christianity became, under Constantine, the avowed public religion of the state. *The light* so long *shining in darkness*, that at first *comprehended it not*,* at length enabled men to see the deformity of some parts of the prevailing system of law and manners. Scarcely had Constantine assumed the imperial purple, when he issued the first of a series of legislative provisions, destined soon to constitute the poor law of the empire.†

[This duty of providing, and of administering, relief for the poor, was in the first instance undertaken by the Christian State, but soon transferred to the Church; and the ample endowment of the clergy, seems to a great extent to have been bestowed for the purpose of enabling them to perform this primary and paramount duty: the administration of relief to the poor, having been transferred from the civil officers of the state, to the clergy. From the age of Constantine, we find an organisation of public charity, in which the Church and the State united their efforts to provide for pauperism. Hospitals, poor-houses, orphan-houses, and other similar establishments, were erected, and richly endowed, in all the chief cities of the empire; and the clergy became everywhere the overseers and relieving officers of the poor. To write the history of the poor,‡ and of the manner of supporting them, for about a thousand years after the establishment of Christianity as the public

* John i. 5.

† The earliest poor law of ancient Rome, may be said to have been the *lex frumentaria* of the younger Gracchus, which lasted much longer than the Agrarian law of Tiberius Gracchus; but, as it seems, was ultimately repealed, and a more limited provision made, by a law of M. Octavius, passed A.U.C., 487. Great abuses, however, crept into the administration of this latter law; which have been paralleled, in very recent times, in England and France, when having temporary recourse to similar expedients. It is only after the accession of Constantine, that the provision for the relief of the Roman poor, becomes fit for comparison with that of modern legislation. See Pauperism and Poor Laws, p. 134. (*n.*)

‡ Pauperism and Poor Laws, p. 136.

religion of the state, would be little else than a continuous chapter in the history of the Church itself, showing how constantly it recognised and practised the duty of relieving the destitute poor.

[The Penitentials, Confessionals, and other Compilations of the Anglo-Saxon prelates, amply testify the unvarying recognition, from the earliest times, of this duty, by the Church of England. The Confessional of Archbishop Ecgberht,* directs the priest to exhort his penitent to be "gentle and charitable to the poor, zealous in alms-giving, in attendance at church, and in the giving of tithe to God's church, and the poor;" and in the canons enacted under Edgar, it is said to be right, "that one part be delivered to the priests, a second part for the need of the church, and the third part for the poor." The ecclesiastical institutes of the early Anglo-Saxon Church, show that the clergy were required, "at the hours when they left off the reading of holy books and prayers," to undertake some useful secular work. "By handiwork," says the law, addressing the clergy alone, "ye may control your bodies, that they be the slower to vices; and, also, ye may provide so by that work, that with your goods ye may help poor men, who have not themselves—*and*," be it observed, "*have not the power to work*." Two centuries after the conquest, we find, in the language of the Church of England, as strong a recognition of that duty of the clergy to relieve the poor, as had been seen in the Anglo-Saxon age. It is required by a canon of the year 1281 [9 Edward I.], that non-resident rectors should at least provide for the necessities of pauper parishioners; and many archbishops of Canterbury appear to have inserted in dispensations for non-residence, an express provision for distributing a portion of the proceeds of the benefice, *among the poor*.†

[When tithes and oblations became payable to rectors of

* Pauperism and Poor Laws, p. 148.

† Id. p. 154, Lyndwood, 132; Gibson's Codex, ii. 885.

parishes, the relief of the poor, while continuing an ecclesiastical, became a *parochial* burthen. An ancient ordinance expressly provided, that the poor are to be sustained, "by the parsons, rectors of the church, and the parishioners; so that none of the poor die of default of sustenance;" the parishioners discharging their duty by paying their tithe, and making their oblations to the church. This duty, moreover, was enforced expressly by an act of parliament, in the reign of Richard II. [stat. 15 Ric. II. c. 6]. Each monastery appears to have had a poor, or alms-house, as part of, or annexed to it, with a relieving officer, or alms-man, whose duties were strictly defined.—Thus it appears, that the Church of England, from the first conversion of the pagan Anglo-Saxons to Christianity, during a long series of centuries, was not only accustomed, but bound, to provide for the maintenance of the poor.

[Even previously to the suppression of the richly-endowed monasteries, and the appropriation to secular purposes of that wealth which had so long contributed to the support of the poor, causes were in existence which greatly embarrassed the legislature, in dealing with the evils of mendicant pauperism. The claims of indigence must then have already exceeded the means, or the will, of the ecclesiastical almoners; for by a statute in the 27 Henry VIII., the officers of towns are directed to collect alms for the purpose of "keeping sturdy vagabonds and valiant beggars" to continual labour. That act directs "every preacher, parson, vicar, and curate, to exhort, move, stir, and provoke people to be liberal for the relief of *the impotent*, and for keeping *and setting to work* the said sturdy vagabonds:" while another clause provides, that "a sturdy beggar is to be *whipped* for the first offence! his *ear cropped* for the second! and, if he again offend, he is to be sent to the next gaol till the quarter sessions; then to be indicted for wandering, loitering, and idleness; and, if convicted, shall *suffer execution as a felon,* and an enemy of the common-

wealth!" While shuddering at the barbarity of such a law, we must not lose sight, as we have already remarked, of the serious difficulties and dangers with which an arbitrary, and not duly considerate legislature, had to deal. The inundation of mendicancy then overspreading the country, had originated out of the first break-up of *the Feudal System*, effected by the permission given, in the preceding reign, to the great landed proprietors, to alien their estates: a change speedily occasioning the dispersion of those numerous bands of retainers, which had been fed by every lord of the soil. Such a state of things it is easy to see must have been fearfully aggravated by the subversion of the religious establishments, in the year 1539, which instantly involved in utter ruin nearly fifty thousand persons*. From that time, till the end of the reign of Elizabeth, we find the statute book swarming with acts against vagrancy and mendicity.

[When Queen Elizabeth commenced her glorious reign, she was grievously moved by the condition of the poor. She is said to have often exclaimed, during her various progresses, on seeing the immense numbers of the destitute everywhere flocking to behold her, *pauper ubique jacet!* † and her reign is distinguished by incessant efforts to ameliorate their condition, without at the same time imposing unjust burthens on other portions of her subjects. Two years before her death was passed the statute (43 Eliz. c. 2,) under the provisions of which all relief of the poor of England and Wales has now been administered for two centuries and a half; and an outline of the chief provisions of this noble act of the legislature, is now presented to the student, with a recommendation of it to his thoughtful consideration, as the basis of all sound legislation on the subject.

[The first section directs that the churchwardens of every parish "and fower, three, or two substanciall householders

* Porter's Prog. of the Nation, p. 85. (Ed. 1847.)

† Pauperism and Poor Laws, p. 188.

there" to be nominated yearly, "shalbe called Overseers of the poore of the same parishe, and they, or the greater partè of them, shall take order from tyme to tyme, by and withe the consent of two or more justices of peace, *for settinge to worke* of the children of all such whose parentes shall not, by the saide churchwardens and overseers, or the greater parte of them, bee thoughte able to keepe and maintaine theire children. And also *for settinge to worke* all such p'sons, maried or unmaried, havinge no meanes to maintaine them, as use no ordinarie and dailie trade of lief to get their livinge by; and alsoe to *raise weekelie*, or otherwise, *by taxacôn* of every inhabitant, parson, vicar, and other, and of ev'y occupier of landes, houses, tithes, impropriate, or propriac'ons of tythes, cole mines, or saleable underwoods in the saide parishe, in such competent sume and sumes of money as they shall thinke fytt, *a convenient stocke* of flaxe, hempe, wooll threed, iron, and other necessarie ware and stuffe, *to set the poore on worke*, and alsoe *competent sumes of money* for and towardes the *necessarie reliefe* of the lame, impotente, olde, blinde, and suche other amonge them, being poore and not able to worke, and alsoe for the putting out of suche children to be apprentices, to be gathered out of the same parishe, accordinge to the abilitie of the same parishe: and to doe and execute all other thinge, aswell for the disposinge of the said stocke, as otherwise conc'ninge the p'misses as to them shall seeme convenient."

[It must be observed, that no provision is here made for either ascertaining *a place of settlement* by which the indigent poor were to be maintained, or for *removing* them to any such place. This had been done advisedly, from a consideration of the evils which had ensued such provisions in an earlier statute of the same reign, (14 Eliz. c. 5,) and the previous one.—From the year 1601 to 1662, the admirable provisions of the former statute, were, though loosely, administered without its being necessary to remove any poor people from one part of the kingdom to another, in order

that they might be relieved. All poor persons were entitled to needful relief, wheresoever residing, without any such interference with the labours of the poor, and with their personal freedom, as was unhappily exhibited by subsequent legislation—it being only the *rogue*, or *vagrant*, that was liable to removal to his place of birth, or his last three years' habitation. The two grand objects of the act had been attained—the relief of the aged and impotent, and the extension of charitable support to the able-bodied, by means of industry, imposed as the peremptory condition on which, alone, relief of the able-bodied could be bestowed.* There was, however, one great omission, among others, in this statute, pointed out by Sir Matthew Hale: no power was given to parish officers to purchase, or hire, any *workhouse*; and with some few local exceptions, it was not till upwards of a century afterwards, viz., in the year 1722, that such a general power for that purpose was conferred, as constituted the workhouse strictly a test of destitution, applicable by parish officers, who were not to give relief to persons refusing to be maintained in such workhouse.

[Unfortunately, the wise provisions of the act of Elizabeth, were not administered vigilantly and faithfully, during the interval of sixty years above adverted to; which led to a great difference in the burthen of pauperism, in different parts of the country, and corresponding impatience and murmuring. At length, in the year 1662 was passed a statute, to which have been generally ascribed a great portion of those serious evils which the Poor Laws have entailed on the country. It recited, that the number of the poor throughout England and Wales had become "very great, and exceeding burthensome, being occasioned by some defects in the law concerning the *settling* of the poor, and for want of a due provision of the regulations of relief and employment in such parishes or places where

* Pauperism and Poor Laws, p. 218.

they are legally settled, which doth enforce many to turn incorrigible rogues, and others to perish for want." This act, therefore, conferred an arbitrary power of *removing* a poor man from the place of his residence, to what is called the place of his *settlement*; a step which had been deliberately discarded, by the great act of Elizabeth. A man's *labour* was thenceforth to be restricted to a single parish: thus serving to restore that ancient relation between the mere land, and the labourer rendering it productive.*

[The statute of Charles II. enacts as follows: and on this, also, as in the case of the statute of Elizabeth, must be bestowed the careful attention of the student:—

[" Whereas, by reason of some defects in the law, poor people are *not restrained from going from one parish to another*, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons and wastes to build cottages, and the most woods for them to burn and destroy; and when they have consumed it, then to another parish, and at last become rogues and vagabonds, to the *great discouragement of parishes to provide stocks*, where it is liable to be devoured *by strangers*; be it therefore enacted,—that it shall and may be lawful, upon the complaint of churchwardens or overseers, within forty days after any such person coming to settle in any tenement under the yearly value of £10, for any two justices of the peace, of the division where any person *likely to be chargeable* shall come to inhabit, by their warrant, to *remove* and convey such person or persons to such parish where he or they were last legally *settled*, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least."

[To the operation of this statute, and the neglect and systematic abuse of its illustrious predecessor, the statute of Elizabeth, seems to be attributable the steady growth of such social evils as at length alarmed all men for the

* Pauperism and Poor Laws, p. 30.

consequences: and parliament, in the year 1833, appointed a body of able and experienced commissioners, to make "a diligent and full inquiry into the *practical operation* of the laws for the relief of the poor, and the manner in which they are *administered*." After extensive investigation, they presented their elaborate "Report," on the 20th February, 1834: which satisfied the country of the necessity for prompt and decisive legislation, in order to arrest the rapid and total demoralisation of the working-classes, which was fatally counteracting all the efforts of philanthropists for enlightening the minds, and improving the condition, of the labouring poor. The commissioners reported, that in the majority of the districts which they had examined, the funds provided under the statute of Elizabeth, for setting to work children and persons capable of labour, but using no daily trade, and the necessary relief of the impotent, "were applied to purposes opposed to the letter, and still more to the spirit of that law, and destructive to the morals of the most numerous class, and to the welfare of all." * It certainly would appear, from the evidence collected by the commissioners, that the fearful existing evils were traceable also, in a great manner, to the operation of the law of settlement and removal. The startled legislature, on the 14th of the ensuing August, passed the important statute, 4 & 5 Will. IV. c. 76, "For the amendment and better administration of the laws relative to the poor in England and Wales," which, though it fell short of the expectations of those who had advocated a fundamental change in the Poor Laws, effected great and salutary improvements in the administration of these laws. As modified by subsequent statutes, it may be stated, in a general way,—that the administration of the parochial funds, and the management of the poor, is now entrusted to a central authority in London, styled "The commissioners for administering the laws for the relief of the poor in England," since called

* Porter's Prog. Nat. p. 87.

(statute 12 & 13 Vict. c. 103, § 21) "The Poor Law Board," consisting of several of the highest officers of the state, and others, who are empowered to issue, under their seal, General Rules, subject to specified supervision. Their whole procedure during the year, moreover, is to be reported to both houses of parliament. They direct the relief of the poor, in any parish, to be administered by a board of Guardians, elected by the owners of property and rate-payers; appoint "Inspectors" to visit workhouses, and be present at meetings of guardians, and other local meetings held for the relief of the poor. They consolidate, in their discretion, but only for the purposes of poor relief, several parishes into "UNIONS," under the government of a single board of guardians, elected by those most interested in the due exercise of their authority: and the parishes thus united, are to have and maintain, at their common expense, a common *workhouse*:—each parish, remaining, however, separately chargeable with the expense of relieving its own poor, whether relieved in or out of the workhouse.*

[The creation of this central authority, able to repress administrative abuses, promptly effected vast improvements, and especially a considerable and just reduction in the sum annually expended in relieving the poor: now, however, amounting to upwards of five millions sterling,† or exactly the produce of the malt-tax!

[A prominent feature of the modern administration of the Poor Laws, was the application of the workhouse test,—that is, the offer of relief only on condition of the applicants and their families becoming inmates of workhouses; but it has been found necessary to relax that test, on account of the popular opposition which it encountered; and this is a feature of the system continuing to afford matter for anxious consideration.

* 3 Steph. Comm. 158—160, where may be seen a careful statement of the existing Poor Laws.

† Pauperism and Poor Laws, p. 272.

[In the year 1846, a considerable mitigation of the system of removal, was effected by statute 9 & 10 Vict. c. 66; which provides that "no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have *resided* FIVE YEARS next before the application for the warrant;" a subsequent section of the statute, prohibiting the removal of persons becoming chargeable in respect of relief, rendered necessary by such sickness or accident as shall not produce permanent disability. One strangely-unforeseen effect of this statute, however, was suddenly to throw the support of a vast number of paupers, on the rate-payers of the towns where such paupers had been residing: a pressure so grievous and urgent, that parliament was obliged, in the ensuing year, by statute 10 & 11 Vict. c. 110, to transfer the burthen of maintaining these irremoveable paupers, from the parish of their residence, to the whole union of which it formed part; and so far equalise the pressure. Still, however, there exist serious inequalities, showing how hard it continues to be, to discover, not only who ought to be relieved, but who ought to relieve.

[Impressed by a sense of the evils of the existing system of settlement and removal, it has been seriously considered by the legislature, of late, whether it would not be wise to lay the axe to the root of them, and abolish the system altogether; making every ordinary pauper, whether English, Scotch, or Irish, relievable at the cost of any place to which he may choose to go, and in which he may be destitute: leaving, then, as the only question to be determined in every case, the fact of destitution. In the year 1847, a select committee of the house of commons resolved thus: "that as the total abolition of the power of removing paupers within England and Wales, would have the effect of greatly increasing the burthens of particular parishes, it is advisable that some change should, at the same time, be made in the distribution of the burthen of relieving the

poor."* In the year 1854, the government introduced a bill "to abolish, in England and Wales, the compulsory removal of the poor, on the ground of settlement; and to make provision for the more equitable distribution of the charge of relief, in unions:" proposing to enact, that "after the passing of act, it should not be lawful for any justice of the peace to remove or convey, or to order to be removed or conveyed, any poor person, from any parish in England or Wales, to any other parish in England or Wales, on the ground that he is legally settled in such last-mentioned parish;" and also proposing an adjustment of the burthen of relief. That attempt, however, was abandoned, as have been others subsequently made: but the subject is still under the anxious consideration of the legislature. It is one environed with difficulties, requiring the utmost deliberation and sagacity to deal with. It is for these reasons deemed unnecessary to afford the student any insight into the vexatious mysteries of settlement law; further than to intimate, that a "settlement". may, at present, be acquired by birth; by parentage; by marriage; by renting a tenement; by being bound apprentice, under certain conditions; by having an estate of the pauper's own in the parish; and by being chargeable to and paying public taxes and levies of the parish. It is easy to conceive to what troublesome and expensive litigation enquiries into such topics may lead, and have long led, alike in the case of an original, or derivative settlement.

[Till recently, the poor in Ireland, were dependent on voluntary charity; but by recent statutes,—chiefly 1 & 2 Vict. c. 56, and 10 & 11 Vict. c. 90,—poor laws are established there, as in England, but under a distinct board of commissioners, sitting at Dublin.

[For the poor laws in force in Scotland, see statute 8 & 9 Vict. c. 83.

[Such is a general explanation of the four words mentioned at the outset of this chapter, as indicating so many

* Parl. Pap. No. 253, Sep. 1847.

sources of social, legislative, and legal difficulty: Rating, and Relief, traceable to the statute of Elizabeth; and Settlement, and Removal, to that of Charles II.

PAUPER SUITS.

[Before closing this chapter, it is proper to apprise the reader of an ancient * and benevolent provision of the English laws in favour of poor suitors—that of enabling them to prosecute, in courts of justice, any claim they may have, without being liable to the ordinary expenses. If a person wish to institute, or to continue, a suit *in formâ pauperis*, he must, to prevent abuse of so great a privilege, lay a case before counsel, for his opinion that he has a good cause of action; but the pauper or his attorney must pledge his oath that the case contains, to the best of his belief, a full and true statement of all the material facts: the affidavit, case, and opinion being laid before the court or judge, to whom the application for leave thus to sue, is made by petition:—the affidavit also alleging, that the pauper is not worth 5*l*., except his wearing apparel, and the matter in question. The order so to sue, excuses the plaintiff, on its production, from the payment of fees. His counsel, and attorney, and the officers of the court, shall then act for him, *gratis*: nor will he be liable for such fees, by reason of his obtaining a verdict exceeding 5*l*. in amount; but he cannot recover costs from his opponent, unless the court, or a judge, make an order to that effect.

[Thus much for the great consideration of the poor, exhibited by the laws of England.]

* 2 Hen. VII. c. 12 (A.D. 1494.)

CHAPTER XLI.

CORPORATIONS.

[1 Bla. Com. 467—485.]

We have hitherto considered persons in their *natural capacities*, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute *artificial persons*, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called "bodies politic," "bodies corporate" (*corpora corporata*), or "Corporations:" of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce: in order to preserve, entire and for ever, those rights and immunities, which, if they were granted only to the individuals of which the body corporate is composed, would, upon their death, be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college, in either of our universities, founded, *ad studendum et orandum*,—for the encouragement and support of religion and learning. If this were a mere voluntary assembly,

the individuals who compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame, nor receive, any laws or rules of their conduct: none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities; for, if such privileges be attacked, who of all this unconnected assembly, has the right or ability to defend them?—And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected with themselves? So, also, with regard to holding estates or other property. If land be granted for the purposes of religion or learning, to twenty individuals, not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But, when they are consolidated and united into a *corporation*, they and their successors are then considered as ONE PERSON, in law; as one person they have *one will*, which is collected from the sense of the majority of the individuals: this *one will* may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws. The privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions, entirely belongs to the Romans. They were

introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *Universitates*, as forming One Whole, out of many individuals; or *Collegia*, from being "gathered" together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline, and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation; particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion, their maxim being that *tres faciunt collegium;* though they held, that if a corporation originally consisting of three persons, be reduced to one, *si universitas ad unum redit*, it may still subsist as a corporation, *et stet nomen universitatis.* [But this seems to have been, because the survivor *represents a body* which is only accidentally reduced to one, and, properly, consists of several persons. The solitary survivor does not properly *constitute* a corporation, though the name and *status* of it may remain. *Si tamen deveniat ad unum, licet unus non sit Universitas, jus, tamen, et nomen universitatis conservatur in illo.*] *

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

The first divisions of corporations, is into aggregate, and sole. *Corporations aggregate*, consist of many persons united together into one society; and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the

* See Bowyer, Com. on Const. Law, 410.

heads and fellows of a college, the dean and chapter of a cathedral church. *Corporations sole*, consist of one person only, and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least the use, of this institution will be apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the church-yard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the then parson, by the bounty of the donor; as a temporal recompence for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue, as a recompence for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would then be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the sovereign: by making him and his successors a corporation. By these means, all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are, in law, one and the same person; and what was given to the one, was given to the other also.

Another division of incorporations, either sole or aggregate, is into *Ecclesiastical*, and *Lay*. *Ecclesiastical corporations*, are where the members composing them are entirely spiritual persons, and incorporated as such; as bishops;

certain deans and chaplains; all archdeacons, parsons, and vicars; which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are elected for the furtherance of religion, and perpetuating the rights of the church. *Lay* corporations are of two sorts, *civil* and *eleemosynary*. The *civil*, are such as are erected for a variety of temporal purposes. The sovereign, for instance, is made a corporation, to prevent the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one sovereign, the successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town, or particular district; [now popularly known as Municipal Corporations, which, as will be presently seen, were entirely remodelled in the year 1835]; some for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns; and others for the better carrying on of divers special purposes: as, the Colleges of Physicians and Surgeons in London, for the improvement of medical and surgical science; the Royal Society for the advancement of natural knowledge; the Society of Antiquaries, for promoting the study of antiquities; and some others. Among these are to be ranked the general corporate bodies of the universities of Oxford, and Cambridge; for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither, are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries, for these are rewards *pro opere et labore*; not charitable donations only, since every stipend is preceded by service and duty: they seem therefore to be merely civil corporations. The *eleemosynary* sort are such as are

constituted for the perpetual distribution of the free alms, or bounty, of the founder of them, to such persons as he has directed. Of this kind are all Hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both in [at all events our ancient] universities and out of them; which colleges are founded for two purposes: the promotion of piety and learning, by proper regulations and ordinances; and imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies, with greater ease and assiduity. These eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved.

I.—Corporations, according to the civil law, seem to have been CREATED by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state.

But with us in England, the consent of the queen, either *impliedly*, or *expressly* given, is absolutely necessary to the erection of any corporation. The implied consent, is to be found in corporations existing by force of the common law, to which our former sovereigns are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole

community. Of this sort are the queen herself, all bishops, parsons, vicars, churchwardens,* and some others; who, by common law, have ever been held, as far as our books can show us, to be corporations *virtute officii*: and this incorporation is so inseparably annexed to their offices, that we cannot form a complete legal idea of any of these persons, but we must also, at the same time have an idea of a corporation, capable of transmitting his rights to his successors. Another method of implication whereby the queen's consent is presumed, is, as to all corporations by *prescription*; such as the city of London, and many others which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes that there once was one; and that, by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the queen's consent is expressly given, are by either Act of Parliament, or Charter.

When a corporation is erected, a NAME is always given to it, or attaches by implication; and by that name alone it must sue and be sued, and do all acts; though a very minute variation therein is not material, [and the name may be changed, by competent authority, without affecting the identity or capacity of the corporation in other respects.]† *Such name is the very being of its constitution,*

* Churchwardens, however, are so far only incorporated by law, as to be capable of taking and holding money or goods, for the use of the parish, by gift or legacy; and to be the proper parties to sue for injury to the goods of the parish, the possession and custody of which are vested in them, for the benefit of the parishioners, in whom alone remains the *property*. Churchwardens, having no common seal, have no power of binding themselves and successors.

† See 3 Steph. Com. 126: and *Reg.* v. *Registrar of J. S. Companies*, 10 Q. B. 839.

and, though it is the will of the queen that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.

II.—After a corporation is so formed and named, it acquires many POWERS, RIGHTS, CAPACITIES, and INCAPACITIES, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed, as of course. As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession for ever, without an incorporation: and therefore all aggregate corporations have a power necessarily implied of electing members, in the room of such as go off. 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase [and subject to the mortmain acts, take by devise], lands, and hold them, for the benefit of themselves and their successors; which latter two are consequential to the first. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole. [Trading corporations, however, in order to enable them more readily to accomplish the purpose for which they are created, are enabled to do certain acts without the affixing of their common seal.] 5. To make, [alter, or repeal] bye-laws or private statutes, for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, [or inconsistent with their charter, or manifestly unreasonable], and then they are void. This is

also included by law in the very act of incorporation: for, as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic.

These five powers are inseparably incident to every corporation, at least to every corporation aggregate: for two of them, though they may be practised, yet are unnecessary to a corporation sole, viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says invisible, and existing only in intendment and consideration of law. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. [Instances may suggest themselves, of corporations levying troops against the crown, under the common seal: but such acts are beyond the scope and object of the institution; wholly uninvested with the corporate character; and utterly void as corporate acts: but are treasonable and punishable as such, in the individuals personally concerned in such acts.] A corporation cannot [it would seem] be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. [Yet it may be named such in the will, and appoint syndics, to receive administration with the will annexed, who may be sworn like other administrators.] * It cannot be seised of lands to the use of another; for such kind of confidence is

* Grant on Corporations, p. 202.

foreign to the end of its institution. Neither can it be committed to prison: for its existence being ideal, no man can apprehend or arrest it. [A corporation may be indicted in certain cases,—as for not repairing a bridge belonging to it; and it may both sue, and be sued, for various causes of action, both in contract, and tort.] And therefore also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding: which also, a corporation cannot do. Neither can a corporation be excommunicated;* for it has no soul, as is gravely observed by sir Edward Coke: and therefore also it is not liable to be summoned in the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can be enforced by only spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot: for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the queen, or the founder, may give them rules, laws, statutes, and ordinances, which they are bound to observe; but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own bye-laws, when not contrary to the laws of the realm. Aggregate corporations also, that have, by their constitution, a head,—as a dean, warden, master, or the

* The civil power no longer enforces this decree of the spiritual judge. Excommunication is now resorted to only as spiritual punishment or censure, for an ecclesiastical offence.

like,—cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete, without a head. But there may be a corporation aggregate constituted without a head: as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the Charterhouse, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed: which perhaps may be one reason why they required three, at least, to make a corporation. But, with us, any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, requiring the unanimous assent of the society to any corporate act; which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations:—it was therefore enacted by stat. 43 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society. [The maxim of law is, *ubi major pars, ibi totum:* the absent members being supposed to side with, and be included in, the greater part. But the will of the majority which binds the whole, must be consistent with the purposes of the incorporation, and be collected at a corporate assembly, duly constituted. And such a majority is not necessarily a *numerical* one: for if the numerical majority direct their votes where they can have no legal effect, they virtually offer no opposition,

and consequently are taken to assent to, the determination of the minority.]

The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one: that of acting up to the end or design, whatever it be, for which they were created by their founder.

III. I proceed next to inquire, how these corporations may be VISITED. For, corporations being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And, for that reason, the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary.—With regard to all ecclesiastical corporations, the Ordinary is their visitor, so constituted by the canon law, and thence derived to us. The pope formerly, and now the queen, as supreme ordinary, is the Visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are, in ecclesiastical matters, the Visitors of all deans and chapters, of all parsons and vicars, and all other spiritual corporations. With respect to lay corporations [of the eleemosynary kind], the founder, his heirs, or assigns, are the visitors; for, in a civil lay incorporation, the ordinary neither can, nor ought to visit; [but its misconduct is inquired into and redressed, and its controversies are decided, in the court of queen's bench, according to the rules of the common law. Colleges are lay corporations, even though they should happen to be composed wholly of ecclesiastical persons; and if the founder have appointed no other visitors, and his heirs become extinct, the crown is the visitor, by the lord chancellor, in the court of chancery.]

IV. We come now, in the last place, to consider how corporations may be DISSOLVED. Any particular member

may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic may also, itself, be dissolved in several ways, which dissolution is the civil death of the corporation. In this case, their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation: for the law annexes a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant fails. The grant is, indeed, only during the life of the corporation, which may endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back, by reversion, as in the case of every other grant for life. The debts of a corporation aggregate, either to, or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities: agreeably to that maxim of the civil law, *si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.* [The corporation has vanished, and with it are also lost and avoided all kinds of claims, debts, and liabilities. No legal proceeding is necessary to ascertain the fact of the complete annihilation of the body politic. There is nothing on which any legal proceeding can operate.]

A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members [or the loss of such an integral part of its members, as the charter requires for corporate elections],* in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the queen, which is a kind of suicide. 4. By forfeiture of its charter, through negligence, or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, whereupon the in-

* 3 Steph. Com. 140.

corporation has become void. And the regular course is to bring an information in nature of a writ of *Quo Warranto*,—that is, to inquire "by what warrant" the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the State, in the reigns of king Charles and king James II., particularly by seizing the charter of the city of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London, was reversed by act of parliament, after the Revolution; and, by the same statute, it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. [It is at present (1855) in the contemplation of the legislature, however, after having instituted an elaborate inquiry, to effect great changes in this ancient and renowned corporation, which was exempted from the operation of the Municipal Corporation Act, in 1835.]

[The above four methods of dissolving a corporation, are those existing at common law. Since, however, by recent acts, charters may be granted for limited periods (stats. 1 Vict. c. 73, § 29, and 7 & 8 Vict. c. 113), a fifth mode of dissolving certain corporations, is, obviously, that of the expiration of their charter. Trading corporations may also now be dissolved, as will presently be shown, by bankruptcy; and joint stock companies dissolved, in conformity with the provisions contained in the Deeds of Settlement.

[This may lead us to some account of the modern creations of *quasi*-corporations, for trading, and other purposes; and of the remodelling, in the year 1835, of our Municipal Corporations. And first, briefly of the former.]

[I. We have seen what are the capacities, incapacities, and the leading incidents attached by the common law to corporations, which are called into existence only by the legislature, or the sovereign's prerogative. No private

persons, be their number great or small, can erect themselves into a *corporation*. Even the attempt to do so,—to assume the character of a corporation, and presume to act as such, without the requisite authority,—is an offence at the common law, as an invasion of the royal prerogative.* However extensive the operations contemplated; however great the funds collected, systematic and complex the relations established, and numerous the individuals associated together; they constitute but a huge partnership, subject to the common law liabilities of all partnerships: every member of which is liable to third parties. The growth of joint stock companies, however, in late years, attracted the attention of parliament; which deemed it expedient to empower the crown to invest them with such powers as might be most useful to them, without, on the one hand, putting them to the heavy expense of obtaining a private act of parliament, or, on the other, conferring on them all the incidents of corporate existence. The first attempt of the kind was made by stat. 6 Geo. IV. c. 91; the legislature interfering several times, subsequently, with the general object of elevating these powerful associations nearer to the level of corporations. At length, after much consideration, and owing to the prodigious growth of railroad, banking, gas, steam, mining, and other joint stock companies, was passed stat. 7 Will. IV. and 1 Vict. c. 73; by which the legislature empowered the crown to confer peculiar privileges, under due limitations, on associations of this kind—one great feature being the limitation, to a certain extent, of individual liability. The act introduced an entirely new system, to which bodies receiving charters under the act, were restricted: such bodies partaking,

* *Duvergier* v. *Fellows*, 5 Bing. 248. See the same case in Error, 10 B. & C. 826. The doctrine of this case was, however, after deliberation, qualified by the Court of Common Pleas, in the cases of the *London Grand Junction Railway Company* v. *Freeman*, 2 M. & G. 666; and *Garrard* v. *Hardey*, 5 M. &. G. 471.

in some degree, of the nature of corporations, but in other respects remaining liable to the general law of partnership.

[The practical operation of this act was not successful. The application for charters under it was voluntary, and made seldom, though companies multiplied: while the power of granting or withholding these privileges was virtually vested in the Board of Trade, and not always exercised satisfactorily. A series of corporations thus became established by no better a title than the will of an individual minister: than which, as was justly said in parliament, by one who had exercised that power,* nothing could be more objectionable: for the legislature ought to make the law available, with perfect equality, to all persons, and so render the officers who carried it into effect, the ministers and not the dispensers of the law; the benefit of which should be open to all the Queen's subjects, without regard to the tendency of mind existing in those who happened to be holding office. In the mean time, the rapid increase of Joint Stock Companies, and the magnitude of their transactions, loudly demanded bold but discreet legislative interference; and, seven years afterwards, viz., in 1844, was passed statute 7 & 8 Vict. c. 110, for "The Registration, Incorporation, and Regulation of Joint Stock Companies:" aiming at a comprehensive system, having for its object simplicity of arrangement, publicity, responsibility, and equitably adjusted rights and liabilities between companies and their members, and the public. These ends were sought to be attained, mainly by means of machinery by which a Provisional became, on compliance with prescribed conditions, a Complete registration. In other words, the former indicated an inchoate, and the latter a complete, Company, deemed thereupon partially incorporated, but not so as to avert individual liability from shareholders, in the case of creditors who had failed, after due diligence, to obtain satisfaction out of the

* Hans. (3rd Series), vol. cxxxix, p. 341.

corporate property. The enactments of this statute, however, though combined with one of the same session (c. 111) 'for Winding up the affairs of Joint Stock Companies unable to meet their pecuniary engagements,' and subsequently amended by others, failed to attain its object. At length, the principle of Limited Liability (*i. e.*, restricting individual liability to the amount of capital embarked) being strongly pressed on the legislature, it was completely conceded, with reference to Joint Stock Companies, in the year 1855, by stat. 18 & 19 Vict. c. 133, on compliance with certain prescribed conditions. This act was declared, however, to be only a temporary measure, introductory of another, applicable to the cases of limited as well as unlimited liability, and remodelling the whole code of regulations applicable to Joint Stock Companies. In the ensuing year accordingly, was passed, after encountering strong opposition, "The Joint Stock Companies Act, 1856," (stat. 19 & 20 Vict. c. 47,) professing 'to consolidate and amend the law relating to Joint Stock Companies.' It prescribes 'Regulations for their Management;' secures publicity for their proceedings; imposes wholesome checks on the managing bodies; and provides for the dissolution and winding up the affairs of a company, at the earliest moment that such a step may be deemed expedient. While the Act expressly excludes from its operation, Banking and Insurance Companies, it yet repeals, *absolutely*, the old Joint Stock Companies Act of 1844; in this respect, and it is feared, in others, exhibiting marks of inaccurate and perfunctory legislation.

[Such are the means taken by a watchful legislature, to repress illegitimate, without discouraging legitimate commercial speculation and enterprise, and hold the balance evenly, between public and private interests, rights, and liabilities;—such the extent to which it has relaxed the rigid common law rules regulating corporations; and, while so doing, affording, to a thoughtful observer, an instructive illustration of the reason on which these rules

are founded, and the policy of modifying them from time to time, in accordance with the exigencies of the age.

[II. There remains to be noticed, however, a still more important interposition of the legislature, scarcely second in its social and political consequence to the Acts of the year 1832,* for amending the Representation of the People; that passed on the 9th of September, 1835, as one of the early fruits of that great constitutional change,—for remodelling lay or municipal corporations, by stat. 5 & 6 Will. IV., c. 76. It is indeed almost impossible to overestimate the magnitude of the change then, and thus, effected, the regulating principle of which was, in the first instance, that of local self-government.

[The passing of this Act was preceded by a commission, the strict legality of which was warmly contested, and may yet be doubted, to enquire into the existing state of municipal corporations in England and Wales, and to collect information respecting the defects in their constitution. The following statement occurs in the First Report of the Commissioners:—"There prevails among the inhabitants of a great majority of the incorporated towns, a general, and in our opinion, a just dissatisfaction with the municipal institutions; a distrust of the self-elected municipal councils, whose powers are subject to no popular control; and whose acts and proceedings, being secret, are not checked by the influence of public opinion; a distrust of the municipal magistracy, tainting with suspicion the local administration of justice—a discontent under the burthen of local taxation, while revenues are diverted from their legitimate use."† This paragraph, containing so stern and sweeping a denunciation of the condition and administration of the municipal corporations of that day, affords a key to the legislation by which the alleged faultiness of their condition was to be remedied. The object of the

* Ante, p. 135, *et seq.*

† First Rep. 30th March, 1835, p. 49. See 3 Steph. Com. 143 (*m*).

Municipal Act, passed within six months of the date of the above-mentioned report, was to place these important institutions, then exhibiting, undoubtedly, an inconvenient variety and imperfection of structure, on a more satisfactory and an uniform basis, and to purify their internal economy.*

[The municipal polity of cities, towns, and boroughs, obviously requires a species of government, different from that applicable to agrarian districts.† The comparatively small space within which considerable bodies of inhabitants are assembled, and the variety of distinct classes comprised within the limits of every town, render peculiarly necessary a vigorous government. There are, besides, various things requisite for health, convenience, and ornament, in towns, which are unnecessary, or inapplicable, in agrarian districts: while the former present special facilities for self-government.

[The inhabitants of towns are easily assembled to elect magistrates, or to deliberate on their municipal affairs; and there are always to be found among them a sufficient number of persons, peculiarly capable, from education, and habits of business, to conduct their affairs. These peculiar circumstances may be regarded as having, so to speak, almost necessarily developed, the municipal liberties of towns, all over the world.

[The leading features of our existing municipal constitutions (with the exception, at the present moment, of London, and a very few other places), may be briefly thus stated.

[All municipal corporations consist of a MAYOR, ALDERMEN, and BURGESSES, as they are called in towns and CITIZENS in cities. These last, it is of great importance to observe, consist of male persons, British subjects of full age, who have not received parish relief, or other parochial alms, within the twelve months immediately preceding the period of placing their names on the borough roll;—and who on the last day of August shall have *occupied any* house,

* 3 Steph. Com. 143. † Bowyer, Const. Law, 396.

warehouse, counting-house, or shop within the defined boundaries of the borough, for three years; during which they shall also have been *inhabitant householders* within the borough, or seven miles of it, to be computed by the nearest public road, or way, by land or water; and also during such time have been *rated*, in respect of such premises, to all rates for the relief of the poor; and *paid* all such rates, and all borough rates, in respect of the same premises, except those payable for the last six months, before the last day of August. Here may be seen the close analogy between the conditions of our existing parliamentary and municipal franchise. To indicate in a word or two the nature and extent of the change thus introduced, in the year 1835, into the latter, let it be observed, that till then the title of burgess, or "*the freedom*," as it was called, had been generally acquired only by being born a freeman; by marrying the daughter or widow of a freeman; by apprenticeship for seven years within the borough, to a freeman; or by gift or purchase.*

[The new act, however, (§ 3) in addition to creating the new franchise, expressly prohibited, for the future, the electing, making, or admitting any burgess, or freeman, by gift or purchase; but reserved, subject to certain conditions, the municipal incidents of their freedom, to those becoming such by birth, or servitude;—that is, in respect of the corporate property, and the right to vote at parliamentary elections. The object of the legislature, in creating this new municipal constituency, was doubtless to make it at once the voter's duty and interest, to exercise honestly his municipal rights and privileges, alike as the holder of office, or the elector of others who do: to afford, in any case, to all concerned, easy means for ascertaining a man's responsibility and reputation among his fellow townsmen.

[As in the case of the lists of parliamentary, so those of municipal voters are annually and publicly revised, (between

* First Report of the Commiss. pp. 18, 19.

the 1st and 15th days of October,) by the mayor and two assessors annually elected by the burgesses, from those qualified to be councillors,—who constitute a court for that purpose.

[Every burgess is entitled, provided he can take the declaration in § 50 of the statute, to be elected a COUNCILLOR, provided he have no disqualifying office or place of profit, or any share or interest in any contract or employment,—with certain exceptions,—with, by, or on behalf of the council. A councillor is elected by majority of votes; and must either go out of office, or be re-elected, once in every three years: a third of the council going out of office every 1st of November. The number of councillors is fixed by the schedules A and B, annexed to the Municipal Corporations Act. Thus the burgesses maintain a certain degree of control over those whom they entrust with their affairs, and, at the same time are avoided the inconveniences arising from an annual re-election of the whole body. *

[The ALDERMEN are to be, in number, equal to one-third of that of the councillors, and elected by the council from among those councillors, or persons qualified to be councillors. Every third year, on the 9th of November; half the number of aldermen go out of office—those so retiring, being always those who have been longest without re-election: but each such alderman is, if continuing qualified, capable of immediate re-election: having, however, no vote in the election of a new alderman. Refusal to accept the office, exposes to any fine which the council may by bye-law fix, not exceeding 50*l.*; and a neglect or refusal, whether wilfully or not, to perform the duties of the office, entails a fine of 100*l.* for every offence.

[The MAYOR, who must be elected, as the first business, by the council on the 9th of November, may be one of the outgoing aldermen, even should he subsequently fail to be re-elected an alderman; and is elected from among the aldermen

* Bowyer, 398.

or councillors. A refusal to accept the office subjects to a fine, not exceeding 100*l*. The position of this head of the corporation, remains essentially unaltered by the new act, but his duties are distinctly defined by it. The mayor, aldermen, and councillors, together, constitute the assembly called THE COUNCIL, which is not *the* corporation, nor *a* corporation, but the governing body of the corporation: invested with divers great powers, particularly of levying rates, for municipal purposes, on the inhabitants; making bye-laws for the good government of the town; and also appointing a town clerk and a treasurer (not, however, from among the members of the council), and other usual or necessary officers, and fixing their salaries; as well as a coroner and clerk of the peace, if the borough have a separate court of quarter sessions. The acts of the council must be done by the majority of *those present*, not being less than one third of the entire body: the mayor presiding, or such alderman, or councillor, if no aldermen be present, as those present choose to be chairman of that meeting. To secure the invaluable checks afforded by responsibility and publicity, minutes of the proceedings must be drawn up, and fairly entered in a book, and signed by the mayor, or presiding alderman or councillor: and such minutes are open to inspection,—or making a copy of, or extract from them, by any burgess, at all reasonable times, on payment of a shilling. The council meets once every quarter; but may be summoned by the mayor, on due notice, as often as he pleases. Five members of the council may, in writing, require him to do so; and in case of his refusal, convene one themselves, on giving due and distinct notice of such meeting, and of the business to be transacted at it, signed by the town clerk, and left at the residence of each councillor. The council of every borough not having already a court of quarter sessions, and desiring that one should be held there, may petition for it to the queen. If the application be granted, her majesty (and not as formerly, the

corporation) appoints the recorder, by warrant under the sign manual; to hold his office during good behaviour, his salary being fixed by the council. He is placed, by the act, next in rank to the mayor; and is the sole judge of the court of quarter sessions, and also, if there be such, of any court of record for the trial of civil actions. The mayor and recorder are respectively, *ex officio*, justices of the peace within the borough.

[Any town, whether already incorporated or not, may on petition by the inhabitant householders, obtain from the queen, with the advice of her privy council, a charter of incorporation, according to the Municipal Corporations Act.

[As to corporate property, it is to be observed, that the rents and profits of all hereditaments, and the annual proceeds of all personal property belonging to the borough, and all fines for offences against the Municipal Corporations Act, are to be paid to the treasurer, who must carry them to the account of a fund called "The Borough Fund:" which, subject to the payment of the just debts of the borough, must be applied to the payment of the salaries of the mayor, recorder, and police magistrates, where there are such, and of the town clerk, treasurer, and every other officer appointed by the council:—the expenses of preparing and printing burgess lists and notices; of maintaining the borough gaol, house of correction, and the corporate buildings; and all other necessary matters. If after satisfying all just claims, there be a *surplus*, it is to be applied, under the direction of the council, for the public benefit of the inhabitants, and improvement *of the borough*,—not of the public at large. If there should be, instead of a surplus a deficiency, the council must foresee it, and calculate the probable extent of it, and then supply it by the produce of a borough rate, to be imposed on the inhabitants.

[Finally, all statutes, charters, and usages by which boroughs were formerly governed, are still applicable for

that purpose, so far as they may be consistent with the newly-established system. Where inconsistent, they are expressly repealed.

[Such is an outline of our lately remodelled municipal system; exhibiting the free spirit of our constitution in high action, and the anxiety of the legislature to devise such guarantees and restraints only as are indispensable for the regulation of that spirit. Hence also may be seen how much depends upon the intelligence, moderation, and public spirit of every burgess, either as individually exercising his franchise, or himself filling municipal office: for a town council, according to its conduct, may be a credit or a grievous discredit to the community among which it is called into existence.]

CHAPTER XLII.

PROPERTY, ITS ORIGIN AND GROWTH.

[2 Bla. Com., pp. 2—14.]

There is nothing which so generally strikes the imagination, and engages the affections, of mankind, as *the right of property;* or, that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual. And yet there are few that will give themselves the trouble to consider the *origin* and *foundation* of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or, at best, we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that, accurately and strictly speaking, there is no foundation in *nature*, or in *natural* law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a

particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world, which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinising too nicely into the reasons of making them: [but fairly presuming those laws to have been made, and acquiesced in so long by different classes, with varying and opposite interests, on sufficient grounds of convenience and equity]. But when law is to be considered, not only as a matter of practice, but also as a science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man *dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.** This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American

* Gen. i. 28.

nations, when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of these times, wherein *erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.* Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing: nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the *right* of possession continued for the same time, only, that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it,—for rest, for shade, or the like,—acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero; who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken, is for the time his own.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals, not the immediate use only, but the very substance of the thing to be used. Otherwise, innumerable tumults must have arisen, and the good order of the world been continually

broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by, would have a right to inhabit the one, and to wear the other. In the case of *habitations*, in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a flagrant injustice, and would sacrifice their lives to preserve them. Hence, a property was soon established in every man's house, and home-stall; which seem to have been originally mere temporary huts, or moveable cabins, suited to the design of Providence [after the scattering at Shinar], for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil, or ground, was established. And there can be no doubt, that *moveables* of every kind became sooner appropriated, than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together, without any sensible interruption, and at length by usage ripen into an established right; but principally, because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant; which bodily labour, bestowed upon any subject which before lay in common to all men,

is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of *food* was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water, also, a very important point. And therefore, the book of Genesis, —the most venerable monument of antiquity, even if considered merely with a view to history,—will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in those places where the ground and herbage yet remained in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well, in the country of Abimelech, and exacting an oath for his security, *because he had digged that well.* And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace.

All this while, the soil and pasture of the earth, remained still in common as before, and open to every occupant: except, perhaps, in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands, for the sake of agriculture, was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply

their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the East; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire. We have also a striking example of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose:*—*Let there be no strife, I pray thee, between me and thee, and between my herdmen, and thy herdmen, for we be brethren. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left.* This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not preoccupied by other tribes. *And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, before the Lord destroyed Sodom and Gomorrah, even as the garden of the Lord. . . . Then Lot chose him all the plain of Jordan, and journeyed east; and they separated themselves the one from the other, and Abraham dwelt in the land of Canaan.*

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people.

* Genesis xiii. 8—12.

And so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour: how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered, by those, who have rendered their names immortal by thus civilising mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce was destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or, at least, promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon, and enjoy, the product of his industry, art, and labour? Had not, therefore, a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature! Whereas now, so graciously has Providence interwoven our duty and happiness together, the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as

of exerting its natural. Necessity begat property: and, in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part, only, of society was sufficient to provide, by their manual labour, for the necessary subsistance of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, *how this property became actually* VESTED; or what it is that gave a man an exclusive right to retain, in a permanent manner, that specific land, which before belonged generally to every body, but particularly to nobody? And, as we before observed, that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that OCCUPANCY *gave also the original right to the permanent property in the substance of the earth itself;* which excludes every one else but the owner, from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorff insisting, that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing, to his own continued use, such spots of ground as he found most agreeable to his own

convenience, provided he found them unoccupied by any one else.

Property, both in land and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act showing an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one be possessed of a jewel, and cast it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hide it privately in the earth, or other secret place, and it be discovered, the finder acquires no property therein; for the owner has not, by this act, declared any intention to abandon it, but rather the contrary; and if he lose it, or drop it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this is the doctrine of the law of England, with relation to *treasure trove.*

[It is of great importance that right notions should be entertained on the subject of *finding lost goods.*—If one man lose goods, and another find and appropriate them to his own use, it is, or is not, a theft—or larceny—according to circumstances. The rule was lately thus laid down, by a great authority, after long argument and grave consideration. "If a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. If, however, he have taken them with a like intent, though lost, and reasonably supposed by him to be lost, but reasonably

believing that the owner can be found—that is larceny."* A recent case † affords an interesting and striking illustration of this rule. A person purchased, at a public auction, a bureau; in which he afterwards discovered a secret spring-drawer, containing gold, and a roll of bank notes, which he appropriated to his own use. At the time of the sale no one knew, or suspected, that the bureau contained anything. It was held that, though there had been a lawful delivery of the *bureau* to the buyer, there had been none of the *money*. The seller had had no intention to deliver it, nor the buyer to receive it; both were ignorant of its existence; and when the buyer discovered that there was a secret drawer containing the money, it was a simple case of *finding*; and if the finder of a lost article know who is the owner of it—or if, from any mark on it, or the circumstances under which it is found, the finder could be reasonably ascertained—then the retaining possession of it, for his own use, by the finder, constitutes the offence of larceny:—as when a person finds a pocket-book with bank notes, on which a name is written, or a hackney coachman abstracts the contents of a parcel left in his coach by a passenger whom he could easily ascertain: or a tailor finds a pocket-book in a coat sent to him to repair by a customer whom he must know:—each one of these three finders is guilty of larceny, if he appropriate the articles to his own use. It is indeed the moral and legal duty of every finder of property, to make a *bonâ fide* effort to discover the owner. In the case above-mentioned, the court was unanimously of opinion, that, if the buyer of the bureau had no ground to believe that he had bought the contents of the bureau, his abstraction and appropriation of the contents was a felony.]

But this method of one man's abandoning his property, and another seizing the vacant possession, however well

* Reg. *v.* Thurborn, 2 C. & K. 831; per Parke, B.
† Merry *v.* Green and Another, 7 Mee & W. 623.

founded in theory, could not long subsist, in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased, among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what had become inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor. Thus, mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agreed to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only, or first man, acquainted with such my intention, immediately steps in and seizes the vacant possession. Thus, the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the *death of the occupant;* when, both the actual possession, and intention of keeping possession, ceasing, the property which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also

have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society; for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But, as under civilised governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation, which is a kind of secondary law of nature, has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglect to dispose of it, or be not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir, of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again vacant, would occasion. And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of *escheats* is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be found.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive, at first view, that it has nature on its side; yet we often mistake for nature, what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right. It is true, that

transmission of one's possessions to posterity, has an evident tendency to make a man a good citizen, and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original, arose not from speculations altogether so delicate and refined; and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children, or nearest relations, are usually about him on his death-bed, and the earliest witnesses of his decease. They became therefore generally the next immediate occupants; till, at length, in process of time, this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a man's servants, born under his roof, were allowed to be his heirs, being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that, *since God had given him no seed, his steward Eliezer, one born in his house, was his heir.*

While property continued only for life, testaments were useless and unknown; and when it became inheritable, the inheritance was long indefeasible, and the children, or heirs at law, were incapable of exclusion by will. At length, however, it was found, that so strict a rule of inheritance made heirs disobedient and headstrong; defrauded creditors of their just debts; and prevented many provident fathers from dividing or charging their estates, as the exigencies of their families required. This introduced, pretty generally, the right of disposing of one's property, or a part of it, by testament (that is, by written or oral instructions, properly witnessed and authenticated,) according to the pleasure of the deceased, which we therefore emphatically style his "will." This was established in some countries much later than in

others. With us in England, till modern times, a man could dispose of only one-third of his moveables, from his wife and children; and, in general, no will was permitted of lands, till the reign of Henry VIII.; and then only of a certain portion; for it was not till after the Restoration, that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance, and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance, under different national establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws, in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. Thus, in general, only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance; in real estates, males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience, in opposition to the rules of law. If a man disinherit his son, by a will duly executed, and leave his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only one witness instead of two, at the least, which the law now requires in all cases, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them

certainly proceed upon erroneous principles; as if, on the one hand, the son had by nature a right to succeed to his father's lands; or, as if, on the other hand, the owner were by nature entitled to direct the succession of his property, after his own decease. Whereas the law of nature suggests, that on the death of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered, for the sake of civil peace, by the positive law of society. The positive law of society, which is, with us, the municipal law of England, directs it to vest in such person as the last proprietor shall, by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites shall have been omitted, the right of the heir is equally strong, and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites had been observed.

But after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being those wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such, among others, are the elements of light, air, and water: which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, [i. e., of a wild and untameable disposition:] which any man may seize upon, and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandon the use of them, they return to the

common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again; there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest, by the well-known appellation of *game*. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by expressly designating those to whom such things are to belong. And thus the legislature of England has universally promoted the grand ends of civil society, and the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership, a legal and determinate owner.

[The enclosure of commons, fields, and waste lands, and consequent extinction of common rights in them, being justly deemed objects of great importance to agricultural improvement, had been long provided for by local acts. A General Enclosure Act (41 Geo. III. c. 109) was passed in the year 1801, consolidating a great number of regulations for effecting that object. By two subsequent statutes (6 & 7 Will. IV. c. 115, and 8 & 9 Vict. c. 118, amended by several subsequent acts) provision is made for enclosing and improving open and common lands of any kind, by consent of the parties interested, without either an act of parliament, or the intervention of commissioners; and for facilitating such exchanges and divisions of lands as may be beneficial to the owners.]

CHAPTER XLIII.

THE FEUDAL SYSTEM.

[2 Bla. Com. 44—58.]

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe, upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it, the Law of Nations in our western world.

No industrious student of English law will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the ancient. [It is well observed by one of the greatest jurists of the United States of America,* in speaking of the Commentaries of Sir William Blackstone, that "what is obsolete, is necessary to illustrate that which remains in use."] Nor will these researches be altogether void of rational entertainment, as well as use: as in viewing the

* 1 Kent Comm. 512.

majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour. [It has been long and much disputed, among very learned and eminent persons, whether feudal tenures were in use among the Anglo-Saxons. The opinion of Spelman, that they were introduced with the Norman conquest, is substantially adopted by Hale, Blackstone, and Edmund Burke; but Mr. Hallam and others consider that the Anglo-Saxon, exhibits much of the intrinsic character of the feudal, relation. Sir F. Palgrave regards the feudal system as created by the union of Roman laws and barbarian usages; and that the main difference between the Anglo-Saxon and Norman feudality consisted in the latter's establishment of a more certain course of descent and inheritance.]

The constitution of feuds had its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards; who, all migrating from the same *officina gentium*, as Craig justly entitles it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions; and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again, in smaller parcels or allotments, to the inferior officers, and most deserving soldiers. These allotments were called *feoda*, i. e., feuds, fiefs, or fees; which last appellation, in the northern languages, signifies a conditional stipend, or reward. Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or

oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself; and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country: the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them, thought it necessary to enter into the same, or a similar plan, of

policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, that is, wholly independent, and held of no superior at all; now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty. And thus, in the compass of a few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. This alteration of landed property, in so material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries [comparatively speaking] lost and forgotten; and Italy itself, as some of the civilians, with more spleen than judgment, have expressed it, *belluinas, atque ferinas, immanesque Longobardorum leges accepit*.

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman.

In consequence of this change, it became a fundamental maxim and necessary principle,—though in reality a mere fiction,—of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived as a gift from him, to be held upon feudal services." For this being the real case, in pure, original, proper feuds, other nations who adopted this system, were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was really far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more, than to put the kingdom in a state of defence, by

establishing a military system; and to oblige themselves, in respect of their lands, to maintain the king's title and territories, with equal vigour and fidelity, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce, not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had, in fact as well as theory, owed everything they possessed to the bounty of their sovereign lord!

Our ancestors, therefore, who were by no means beneficiaries, but had consented to this fiction of tenure from the crown, barely as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions, from principles that, as to them, had no foundation in truth. [The compulsory relaxation of the rigour of the feudal system, by successive sovereigns, is a matter which can hardly be appreciated in modern times; but regard being had to the state of freedom on which they had encroached, we may deduce hence a material inference,] that the liberties of Englishmen are not, as some arbitrary writers would represent them, mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution of which our ancestors had been, rather, defrauded by the art and finesse of the Norman lawyers, than deprived by the force of the Norman arms.

The grand and fundamental maxim of all feudal tenure is this; that all lands were originally granted out by the sovereign, and are therefore "holden," either mediately or

immediately, of the crown. The grantor was called the proprietor, or lord, being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the "tenant" or "holder" of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word "vassal" opprobriously, as synonymous with slave, or bondman. The manner of the grant was by words of gratuitous and pure donation, "*dedi et concessi;*" which are still the operative words in our modern infeodations, or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession, in the presence of the other vassals, which perpetuated among them the æra of the new acquisition, at a time when the art of writing was little known; and therefore the evidence of property, was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant, upon investiture, did usually homage to his lord, openly, and humbly kneeling, being ungirt, uncovered, and holding up his hands, both together, between those of the lord, who sat before him, and then professing that "he did become his man, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or manhood, by the feudists, from the stated form of words, *devenio vester homo*.

When the tenant had thus professed himself to be the "man" of his superior, or lord, the next consideration was

concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do suit to, the lord, in his courts, in time of peace; and in his armies, or warlike retinue, when necessity called him to the field.

Genuine or original feuds, were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feudal polity was greatly extended; these inferior feudatories, being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords. But this, at the same time, demolished the ancient simplicity of feuds: and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession: which were held no longer sacred, when the feuds themselves no longer continued to be purely military.

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which the most refined and oppressive consequences were drawn from what was originally a plan of simplicity and liberty, equally beneficial to both

lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised. What effect it has produced on the landed property of England, must be gathered from [a careful study of our Ancient Tenures, a faint outline of which may be seen in the ensuing chapter.]

CHAPTER XLIV.

THE ANCIENT ENGLISH TENURES.

[2 Bla. Com. 59—77.]

ALMOST all the real property of this kingdom is, by the policy of our laws, supposed [for the reason explained in the preceding chapter] * to be granted by, dependent upon, and holden of, some superior lord, by and in consideration of certain services to be rendered to the lord, by the tenant or possessor of this property. The *thing holden* is therefore styled a "*tenement*," the possessors thereof are "*tenants*," and the manner of their possession is a "*tenure*." Thus all the land in the kingdom is supposed to be "holden," mediately or immediately, of the king, who is styled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as themselves were still tenants with respect to the king: and, thus partaking of a middle nature, they were called *mesne*, or middle, lords. So that if the king granted a manor to A, who granted a portion of the land to B, now B was said to hold of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord

* Ante, p. 425.

paramount; A was both tenant and lord, or was a mesne lord: and B was called tenant *paravail,* or the lowest tenant; being he who was supposed to make "avail," or profit, of his land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke, in the law of England we have not properly *allodium;* * which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services, or renders, that were due to the lords from their tenants. The *services,* in respect of their quality, were either *free,* or *base:* in respect of their quantity, and the time of exacting them, *certain,* or *uncertain. Free* services were such as were not unbecoming the character of a soldier, or a free man to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his manure, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain,* depended upon unknown contingencies; as, to do military service in person; to pay an assessment in lieu of it, when called upon; or to wind an horn whenever the Scots invaded the realm: which are free services: or to do

* There are, or were, some remains of *allodial* possession in the Shetland Islands, where the persons holding the *allodial* lands were denominated *Udallers.*

whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the [seventeenth] century; and three of which subsist to this day. Of these Bracton, who wrote under Henry III., seems to give the clearest and most compendious account, of any author ancient or modern; of which the following is the outline, or abstract: first, where the service was free but uncertain, as military service with homage, that tenure was called the tenure of chivalry, *per servitum militare*, or by *knight-service*. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty &c., that tenure was called *liberum socagium*, or *free socage*. These were the only free tenures: the others were villenous or servile, as, thirdly, where the service was base in its nature, and uncertain as to time or quantity, the tenure was *purum villenagium*, absolute or *pure villenage*. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage, from the certainty of its services, but degraded by their baseness into the inferior title of *villanum socagium*, *villein socage*.

The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service.

This tenure of knight-service had all the marks of a strict and regular feud; it was granted by words of pure donation, *dedi et concessi*; was transferred by investiture, or delivering corporal possession of the land, usually called *livery of seisin*; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, reliefs, primer seisin, wardship, marriage, fines for alienation

and escheat [all of which are explained at large in the text from which this passage is taken].

Personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords, in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti; scutum* being then a well-known denomination for money: * and, in like manner, it was called, in our northern French, *escuage;* being indeed a pecuniary instead of a military service. But by these means all the advantages, either promised or real, of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia, composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which, in consequence of the fiction adopted after the conquest, were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief, and *primer seisin;* and, if

* Hence in modern French *ecu*, spelt in the older writers *escu*, a crown, and the Italian *scudo*.

under age, of the whole of his estate during infancy. And then, as sir Thomas Smith [who was secretary to Edward VI.] feelingly complains, "when he came to his own, after he was out of *wardship*,—his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren,"—to reduce him still further, he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a licence of alienation!

A slavery so complicated, and so extensive, called aloud for a remedy, in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. At length the military tenures, with all their heavy appendages, having during the usurpation been discontinued, were destroyed, at one blow, by the statute 12 Car. II. c. 24, which enacts, [after abolishing many heavy impositions] "that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." This statute, was a greater acquisition to the civil property of this kingdom, than even *magna charta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of king Charles extirpated the whole, and demolished both root and branches.

CHAPTER XLV.

THE MODERN ENGLISH TENURES.

[2 Bla. Com., 78—101.]

ALTHOUGH, [by the means briefly indicated in the preceding pages,] the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II. c. 24, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called FREE AND COMMON SOCAGE. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain, in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and

swallowed up, since the statute of Charles II., c. 24, almost every other species of tenure.

It seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called *gavelkind*, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror, is a fact universally known. And those who thus preserved their liberties, were said to hold in free and common socage.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration of 1660, when the former was abolished and sunk into the latter: so that the lands of both sorts are now holden by one universal tenure of free and common socage.

The other grand division of tenure mentioned by Bracton, as cited in the preceding chapter, is that of *villenage* as contradistinguished to *liberum tenementum*, or frank tenure. And this, we may remember, he subdivided into two classes, pure and privileged villenage: whence have arisen two other species of our modern tenures.

From the tenure of *pure villenage* have sprung our present *copyhold tenures*, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors are, in substance, as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those existing at this day. A manor,—*manerium, a manendo*,—because the usual residence of the owner, seems to have been a district of ground, held

by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales*, or demesne lands; being occupied by the lord, or *dominus manerii*, and his servants. The other, or tenemental lands, they distributed among their tenants: which from the different modes of tenure were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free socage lands: and hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people, at the pleasure of the lord, and resumed at his discretion; being, indeed, land held in villenage. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanours and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost. [This court is fallen into disuse: and by the county courts act (9 & 10 Vict. c. 95, § 14) the lord of any manor having any court in which debts or demands are recoverable, may surrender to the crown the right of holding such court, which thenceforth is discontinued, and the right to hold it has ceased.]

The good-nature and benevolence of many lords of manors having, time out of mind, permitted their tenants and villeins, and their children, to enjoy their possessions without interruption, in a regular course of descent, the common law, of

which custom is the life, now gave them a title to prescribe against their lords; and, on performance of the same service, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the customs of the manor; which customs are preserved and evidenced, by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates, but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself *a copyhold.*

Thus copyhold tenures, as Sir Edward Coke observes, although meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. This affords a substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. Thus the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before, though, in general, the villein services are usually commuted for a small pecuniary "*quit rent.*"

A compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, leads us to remark the mutual connection and dependence that all of them have upon each other. And upon the

whole it appears, that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the time of statute 12 Car. II., all lay tenures are now, in effect, reduced to two species, free tenure in common socage, and base tenure by copy of court-roll.

[The rights of lords of manors to fines and heriots, rents, reliefs, and customary services, together with the lord's interests in the timber grown on copyhold lands, have long been found productive of considerable inconvenience to copyhold tenants, without any sufficient corresponding advantage to the lords. A recent act of parliament, therefore, (4 & 5 Vict. c. 35) amended, explained, and continued by subsequent acts, greatly facilitates the *commutation* of these rights and interests, by a machinery similar to that for the commutation of tithes. The same act also afforded facilities for enfranchising copyhold lands, with suitable provisions to meet the case of such lands being either in settlement, or vested in parties not otherwise capable of at once entering into a complete arrangement. Under this act the enfranchisement was voluntary: but by a more recent one (15 & 16 Vict. c. 51) the enfranchisement of copyhold lands is made *compulsory*, at the instance of either lord or tenant,—but such enfranchisements, are not to affect the estates or rights of either party in any mines or minerals within or under the lands so enfranchised or any other lands. When all parties are *sui juris*, and *agree* to an enfranchisement, it may be made by a simple conveyance of the fee simple from the lord to his tenant.]

CHAPTER XLVI.

NATURE OF REAL AND PERSONAL PROPERTY.

The objects of dominion, or property, are, by the law of England, distributed into two kinds; Things Real, and Things Personal.

[In the early ages of Europe,* property was chiefly of a substantial and visible, or as lawyers call it, a corporeal kind. Trade was little practised, and debts, consequently, were seldom incurred. There were no public funds, and of course there was no funded property. The public wealth consisted principally of land, and the houses and buildings erected on it; of the cattle in the fields; and the goods in the houses. Now land, which is *immoveable* and indestructible, is evidently a different species of property from a cow, or a sheep, which may be stolen, killed, or eaten; or from a table, or chair, which may be broken up or burnt. No man, be he ever so feloniously disposed, can run away with an acre of land. The owner may be ejected; but the land remains where it was: and he who has been wrongfully turned out of possession, may be reinstated into the identical portion of land from which he had been removed. It is not so with *moveable* property. The thief may be discovered

* See Principles of the Law of Real Property, and Personal Property, by Joshua Williams, *passim*. These two small and valuable volumes should be among the earliest, if not the earliest, placed in the hands of law students.

and punished; but if he has made away with the goods, no power on earth can restore them to the owner. All he can hope to obtain, is a compensation in money, or in some other article of equal value. But if the goods continue in existence, they revest in the owner, on conviction, even without an order for restitution, which is only cumulative to the ordinary remedy by action.*

[*Moveable* and *Immoveable*, is thus seen to be one of the simplest and most natural divisions of property, in times of but partial civilisation; and in our law, this division has been brought into great prominence, by the circumstances of our early history—by the Norman Conquest, and the introduction of the Feudal System. The system of tenure, as described in the last two chapters, evidently could exist only as to the former of these two great classes,—to lands and things immoveable. Cattle and other moveables, were things of too perishing and insignificant a nature to be subject to any feudal liabilities; and consequently could be bestowed, if at all, only as absolute gifts. No duty, or service, could be properly annexed as the condition of ownership. Hence it came to pass that a sort of superiority became attached to all immoveable property, and the distinction clearly marked between it and moveable. The former was treated as being of a higher nature than the latter: so that while Lands were the subject of the disquisitions of lawyers, the decisions of courts of justice, and the attention of the legislature,—Moveable property passed almost unnoticed.] Our first legislators took all imaginable care in asserting their rights, and directing the disposition of such property as they deemed to be lasting, and which would answer to posterity the trouble and pains that their ancestors had employed about them; but entertained a low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The

* *Scattergood* v. *Silvester*, 15 Q. B. 506. And trover may be maintained, notwithstanding there have been a sale in market overt. Id. ib.

amount of it indeed, was [as we have intimated,] comparatively trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages.

Hence it was, that a tax of the fifteenth, tenth,—or sometimes a much larger proportion—of all moveables, was frequently imposed without scruple, and is mentioned with unconcern by our ancient historians; though *now* it would justly alarm our opulent merchants and stock-holders. And hence, also, may be derived the frequent forfeitures inflicted by the common law, of all a man's goods and chattels, for misbehaviour and inadvertencies that at present hardly seem to have deserved so severe a punishment.

[Lands, houses, and immoveable property, were called as we have seen, Things *held*: i. e. *Tenements*. They were also denominated *Hereditaments*: because, at the death of the owner, they devolved, by law, on his *heir*. Thus the old lawyers, to indicate all sorts of immoveable property, used the phrase, "lands, tenements, and hereditaments;" and it is retained to the present day. Moveable property was known by the name of "goods and chattels"—"bona et catalla." The word "chattels" according to Sir Edward Coke, a French word, signifying goods, is, in truth, derived from the technical Latin word *catalla*; which primarily signified only beasts of husbandry, or, as we still call them, *cattle*: but in its secondary sense, was applied to all moveables. Not only goods, but whatever was not a feud, were accounted chattels; and it is in this latter, more extended, negative sense, that our law adopts it; the idea of "goods" or "moveables," only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest.

[So great was the influence of the feudal system, and so important the *tenure* or *holding* of lands, that for a long time immoveable property was known rather by the name of "tenements," than by any other indication of its fixed

and immoveable nature.* When, however, the feudal system gave way before the growth of a commercial spirit, the rising power of towns, and the formation of an influential middle class, its form remained, after its spirit was extinguished by the blow struck at the restoration.† The tenure of land became then less burthensome to the owner, and less troublesome to the student; and courts of law, instead of being occupied by disputes between *lords* and *tenants*, had their attention more directed to controversies between different owners. It became then more obvious, that the essential difference between lands and goods was to be found in the *remedies* ‡ for the deprivation of either: —that land could be always restored, but goods could not; that as to the one, the *real* land itself, could be actually recovered; but as to the other, proceedings must be had against the *person* who had taken them away. The two great classes of property began, accordingly, to acquire two other names, more characteristic of their difference. The remedies for the recovery of lands had long been called *real* actions; and the remedies for the loss of goods, *personal* actions. It was not, however, till after the feudal system had lost its hold, that land and tenements were called *real* property; and goods and chattels *personal* property.

[It appears, then, that lands and tenements were designated, in later times, Real Property, more from the nature of the legal remedy for their recovery, than simply because they are Real things; and, on the other hand, that goods and chattels were called Personal Property, because the remedy for their abstraction was against the person who had taken them away. The terms Real Property and Personal Property are now more commonly used than the old terms "tenements and hereditaments," "goods and chattels." The old terms were, indeed, suited only to the feudal times

* It is the only word used in the great statute *De Donis*, 13 Edw. I. c. 1. See Williams, Law of Real Prop. 6 (*n*), 3rd ed.

† Ante, p. 434.

‡ Will. Real Prop. 6.

in which they originated. Great social changes have since happened. Commerce has been widely extended; loans of money at interest (formerly called unchristian) have become of constant occurence; and the funds have engulfed an immense mass of wealth.* Both classes of property have accordingly been increased by fresh additions; and within the new names of Real and Personal property, many kinds of it are now included, to which our forefathers were strangers. The old division into moveable and immoveable, is lost in the many exceptions occasioned by time, and altered circumstances. Thus, shares in canals and railways, which exist in respect of sufficiently immoveable property, are nevertheless personal property,—as is funded property: whilst a dignity, or title of honour, which we should have thought to be as locomotive as its owner, is not a chattel, but a tenement. The reason is, however, that in ancient times such titles were annexed to the ownership of various lands.

[A remarkable † exception to the original rule, is to be found in the case of a lease of lands or houses, for a term of years. Though the house may be a magnificent castle, the lands almost co-extensive with the county, and the term of the lease for a thousand years, yet the lessee's interest is only a chattel one—it is but his *personal* property. An explanation of the anomaly must be sought in the circumstances of early times. Ancient leases were almost always, or principally, agricultural. Farming then required but little capital; and farmers were regarded as little more than bailiffs, or servants, rather accountable for the profits of the land, at a fixed sum, than having any property of their own. If turned out of possession by any one but his landlord, the former had no means, by legal process, of recovering that possession, his only remedy being by an action of damages against his landlord, who was bound to warrant him quiet possession. Thus the farmer could not

* Will. Law of Real Prop. 8 (*n*). † Id. p. 8.
‡ Id. p. 30.

be regarded as the owner of the land, for even the time of the lease; since his interest, such as it was, lacked that essential characteristic of real property—the capability of being *restored* to its owner.* Such an interest as his, had in its nature nothing feudal, or military; and was consequently exempt from the feudal rule of descent to the eldest son as heir at law. Being thus neither real property, nor a feudal tenement, it could be nothing more, as we have seen, than a chattel; and when leases became longer, more valuable, and more frequent, no change was made; to this day the owner of an estate for a term of years, possesses, in law, merely a chattel. If a lease be granted to an old man tottering on the verge of the grave, "to hold for the term of his natural life," it is a freehold interest, and consequently of a higher nature, in the eye of the law, than a lease for a thousand years.

[There may be at present, more personal than real property in the country; but the latter retains many of its ancient incidents; the most conspicuous one is, that real property descends, on its owner dying intestate, to his *heir;* while under similar circumstances, personal property is distributed, as we shall presently see, among the *next of kin.*

[Another great classification of property is, that of *Corporeal* and *Incorporeal.* This obviously embraces every kind of property, which either is, or is not, tangible and visible. Thus a House is corporeal; but the Rent paid for occupying it, is incorporeal. An annuity, again, is incorporeal; for, though the money produced by it is of a corporeal character, the annuity itself is a thing invisible; though its being be evidenced by a deed, and has only an existence in the mind, and cannot be delivered over from hand to hand. Corporeal property, on the other hand, is capable of manual transfer; and of such as is immoveable, possession may be given up. In many cases incorporeal property

* Will. Law of Real Prop. p. 10.

exists apart from the ownership of anything corporeal; forming a distinct subject of possession, transferable from one person to another; and in such separate transfer lay, till lately, the practical distinction between incorporeal and corporeal property. In ancient times, the impossibility of actually *delivering up* anything of a separate incorporeal nature, rendered necessary some tantamount means of conveyance. For this purpose writing was had recourse to; whilst transfer of corporeal property was long permitted to be effected by the simple delivery of it. Hence, incorporeal property was technically said to "lie in *grant*," and corporeal, to "lie in *livery*," i. e. *delivery* of the seisin, or feudal possession, by actual or symbolical delivery. In the year 1845, however, this ancient distinction was abolished by stat. 8 & 9 Vict., c. 106, § 2; which enacts that thenceforth all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery.

[Incorporeal property, * in our present highly artificial state of property, occupies an important position. These are of two kinds. One of them may be regarded as somewhat of a mixed nature—being at one time incorporeal, and at another not: partaking, during its existence, very strongly of the nature and attributes of the incorporeal hereditaments, particularly in its always permitting, and generally requiring a Deed of Grant for the transfer of it. This class consists of Reversions, Remainders, and Executory Interests. The others are ever of an incorporeal nature, and never assume an incorporeal shape, and consist of three kinds:—those which are *appendant* to corporeal hereditaments; such as are *appurtenant* to them, both passing, simply, by the conveyance of the corporeal hereditaments to which they belong; and such as are *in gross* as its called, i. e. existing as separate and independent

* Will. Law of Real Prop. p. 12.

subjects of property. These, however, are topics requiring the close attention of those who intend to make the law their professional study.

[The methods of transferring real and personal property are widely different. The title to personal property, or personalty, as it is usually called, is far simpler than that to real estate or realty. The greater complexity of the latter, arises partly from the nature of it, and partly from the fuller power of disposition to which lands are subject.* Lands, unlike stock, may be converted, for instance, from arable to pasture; cut up into roads, canals, railways; sold by the foot for building purposes; let upon lease for terms absolute or determinable; held for life, in tail, in fee; and disposed of by the various devices of contingent remainders; shifting uses, and executory devises without the intervention of any trustees. Personal property, on the contrary, cannot be *settled*, without the intervention of trustees; and then the title to it may become as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property.

[Thus the law of England has two different systems of rules for regulating the enjoyment and transfer of property. The laws relating to real estate, though venerable for their antiquity, are in the same degree, ill-adapted to the exigencies of modern society; whilst the laws of personal property, being of more recent origin, are proportionably suited to modern times.† Over both these systems has arisen the jurisdiction of the court of equity; by means of which the ancient strictness and simplicity of our real property laws have, in a great measure, been rendered subservient to the arrangements and modifications of

* Will. Law of Pers. Prop. 304. † Will. Real Prop. 374.

ownership required by the necessities of society. These are matters incessantly occupying the attention of the legislature.

[There is one circumstance connected with the general law of property, which must be borne in mind.* The law will not permit property to be rendered *inalienable*, by any device whatever (except in the case of property given or settled to the use of a married woman): for to permit this would, in the words of Lord Coke, militate "*against trade and traffic*, and against bargains, and contracting between man and man."

[It is proper also to notice the restriction imposed by a modern act of parliament, on attempts to accumulate the income of property, for the benefit of some future owner. That act (39 & 40 Geo. III., c. 98,) was passed in consequence of the extraordinary will of a Mr. Thellusson, who, keeping within existing rules of law, directed the income of his property to be accumulated during the lives of all his children, grandchildren, and great grandchildren, who were living at the time of his death, for the benefit of some future descendants, to be living at the decease of the survivor! To prevent the repetition of such a cruel absurdity, † that act forbids the accumulation of income for any longer term than—the life of the grantor or settlor, *or* twenty-one years from his death; *or* during the minority of any person living, or in *ventre sa mére* at the death of the grantor; *or* during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. Any direction to accumulate income, exceeding the allowed period, is valid up to the extent of that allowed period, but void so far as it may be exceeded.

[The following are the eight Canons of Descent as

* Smith's Merc. Law, p. 157. Co. Litt. 223, *a*.

† Will. Law of Real Prop. p. 261.

altered by the recent Act (3 & 4 Will. IV., c. 106) for the Amendment of the Law of Inheritance:—

[I. Inheritances shall lineally descend, in the first place, to the issue of the last PURCHASER, *in infinitum.*

[II. The male issue shall be admitted before the female.

[III. Where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest, only, shall inherit; but the females shall inherit altogether.

[IV. All the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; i. e. stand in the same place in which he would, had he been alive.

[V. On failure of lineal descendants or issue of the first PURCHASER, the inheritance shall descend to his nearest lineal ancestor.

[VI. The father, and all the male paternal ancestors of the PURCHASER, and their descendants, shall be admitted before any of the female paternal ancestors, or their heirs; —all the female paternal ancestors, and their heirs, before the mother, or any of the maternal ancestors, or her or their descendants; and the mother, and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors, or their heirs.

[VII. A kinsman of the half blood shall be capable of being heir; and such kinsman shall inherit next after a kinsman, in the same degree, of the whole blood; and after the issue of such kinsman, when the common ancestor is a male, and next after the common ancestor when such ancestor is a female.

[VIII. In the admission of female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor, and her heirs: and in the admission of female paternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs.]

CHAPTER XLVII.

WILLS; TESTATORS; INTESTATES.

[A MOMENT's consideration may satisfy even the most unthinking, of the immense importance of the law relating to WILLS: since there are few, in even the humbler classes of society, whom it does not concern. The vast possessions of the opulent, and the small accumulations of a life of severe privation and industry; the feelings and wishes of the living possessor, and the interests of surviving relatives, friends, and other objects of his intended bounty, are alike involved in the code of regulations applicable to such instruments, and the non-observance of them, whether designed or undesigned. When it is borne in mind that a few lines, hastily scrawled by one *in extremis*, and *inops consilii*, may utterly frustrate the writer's real intention, through his ignorance, or the fraud of those around him, no amount of pains and anxiety on the part of the legislature in devising such a code of regulations, and of courts of justice in giving effect to them, can be more than commensurate with the necessity.

[The antiquity of testaments, which may be traced up to patriarchal times,—so far back as the day of Jacob's bequest to his son Joseph,—the history of their introduction into our own country, and of the laws successively enacted with reference to them, may be seen set forth in

the Commentaries.* It must here suffice, and will be regarded as universally interesting and important, to exhibit an outline of the new code enacted at the commencement of her Majesty's reign, by statute 7 Will. IV. and 1 Vict., c. 26, (passed on the 3rd of July 1837), entitled "An Act for the Amendment of the Laws with respect to Wills," which however does not extend to Scotland (§ 35) nor to any will made before the first day of January, 1838.

[Every person of sound mind, and full age, may now make a will: but a married woman is disabled from doing so, except so far as she had been previously enabled to do so, under a power expressly conferred on her for the purpose.

[All Real Estate, and all Personal Estate of every description whatsoever, either at law or in equity, to which the testator shall be entitled at the time of his death (including all property to which he may become entitled between the period of executing his will, and of his death), may be disposed of, by will, to any person either natural or artificial: for a corporation may, subject to the Mortmain and Charitable Uses Acts, take under a will.

[This will, however, must be executed in conformity with the strict and salutary requirements of the statute, as recently amended by statute 15 & 16 Vict., c. 24, entitled "The Wills' Amendment Act, 1852."

[The will must be in writing; and signed by the testator, or by some other person in his presence, and by his direction, at the foot or end of it: but the signature may be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, so as to make it apparent, on the face of the will, that the testator intended to give effect, by such signature, to the writing signed on his will. And no such will shall be affected by the circumstance,

* Vol. II. pp. 374—6; 489—517.

[That the signature shall not follow, or be immediately after the foot or end of the will;

[Or, that a blank there shall intervene between the concluding word of the will, and the signature;

[Or, that the signature shall be placed among the words of the *testimonium* clause, or of the clause of attestation;

[Or, shall follow, or be after or under the clause of attestation, either with or without a blank space intervening;

[Or, shall follow, or be after, or under, or beside the names, or one of the names, of the subscribing witnesses;

[Or, that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, wherein no clause or paragraph, or disposing part of the will shall be written above the signature;

[Or, that there shall appear to be sufficient space on, or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written, to contain the signature:

[And the enumeration of the above circumstances shall not restrict the generality of the above enactment: BUT—

[No signature, under either of these two acts, shall be operative to give effect to any disposition, or direction, which is *underneath, or which follows it;* nor shall it give effect to any disposition or direction inserted after the signature shall have been made.

[In these singularly minute provisions, apparently embracing every case conceivable to occur through haste, accident, or inadvertence, and by which innumerable wills had been avoided, the public were indebted to Lord Chancellor St. Leonards.

[Thus much for the Signature; but it must be made, or acknowledged by the testator, in the presence of TWO or

more witnesses, present at the same time; and they must attest and subscribe the will, in the presence of the testator; but no *form* of attestation shall be necessary: and every will thus executed, is valid without any publication of it; and speaks and takes effect as if it had been executed immediately before the testator's death, unless a contrary intention shall appear by the will. It will thus be observed, that the number of witnesses—two at the least—is now required alike in wills of real and personal estate.

[No obliteration, interlineation, or other alteration can be made after execution, unless effected in the same way as the will was executed.

[Every will made by a man or woman, shall be revoked by marriage; but not by any presumption of an intention, to revoke, on the ground of an alteration in circumstances.

[No will or codicil, nor any part of either, shall be revoked, except as above-mentioned, or by another will or codicil similarly executed; or by some writing similarly executed, declaring an intention to revoke such will or codicil; or by burning, tearing, or otherwise destroying the same, by the testator, or some person in his presence, and by his direction, with the intention of revoking it:—which is of course a matter to be determined before the proper tribunal, according to the evidence adduced for that purpose.

[No revoked will, codicil, nor any part of either, shall be revived, otherwise than by re-executing, or by a codicil similarly executed, and showing an intention to revive the will.

[The will is not affected by the incompetency of any witness attesting it; a gift by the will to any attesting witness, or the husband or wife of one, or any one claiming under them, is utterly null and void, and such attesting witness shall be admissible to prove the execution, validity, or invalidity of the will. So is any creditor attesting the

execution; and an executor. It must, moreover, be borne in mind, that by a subsequent statute, (6 & 7 Vict., c. 85), objections to the competency of witnesses on the ground of interest are removed in every case.—Any soldier in actual military service, or mariner or seaman at sea, may still dispose of his personal estate as before, i. e. by a nuncupative will, by which is meant, a verbal declaration of his will, before a sufficient number of witnesses.

[Such are the leading provisions of this important statute, which contains also others of a highly beneficial and useful character; but it must be remembered, that all wills made before the 1st of January, 1838, are regulated by the former law.

[The construction of wills has long been the occasion of perplexity and trouble to courts of justice; on whom has been imposed the vexatious duty, as it has been well said, of dealing with nonsense, which they must interpret, and make consistent. This arises from a just anxiety to give effect, as far as possible, to the intention of the testator, however rapidly, confusedly, and contradictorily conveyed. For this purpose, the courts will act much more liberally in dealing with wills, than deeds and conveyances, which are, or ought to be, framed with due deliberation. One leading rule is, that whereas in a deed, of two inconsistent clauses, the former is preferred; in a will, the latter is: as being more likely to indicate the *last* wishes of the testator.

[The person to carry into effect the will, is called the executor; of whom as many may be appointed as the testator pleases; but none need act, who does not choose to do so. An executor ought properly to be appointed in express terms: but it will suffice if such appointment appear by clear implication.

The existence of the will is made to appear, legally and officially, by the *Probate:* which consists of a copy made on parchment, under the seal of the ordinary, and delivered to the executor, with a certificate of its having been proved

before him: the original will being deposited in the registry of the Ordinary.

[It must be observed, that though wills of real and personal estate are now attested alike by two witnesses, there is a difference between the operation of them, thus far: that though an executor ought properly to be appointed, in a will of personalty, who becomes from the instant of the testator's death legally entitled to all his personal estate, to be dealt with according to the direction of the will;—under a will, or devise, as it is called, of *real* property, it passes at once to the devisee, and the intervention of an executor is needless, and inapplicable. There is also another distinction: that while a will of personal estate is required to be proved in some ecclesiastical court, it is otherwise with a will of lands; which has always operated, and still operates, as a mode of *conveyance*, requiring no extrinsic sanction to render it available as a document of title. If a person absolutely possessed of real estate, die intestate, it devolves on his heir at law.

[Here may be noticed a "*Donatio Mortis Causâ:*" *i.e.* a gift made in contemplation of death, and to become absolute only on that event. Being a *gift*, it can be made of chattels only, and an actual or constructive *delivery* of them to the donee, is essential. Such a gift is revocable by the donor; and after his death, is subject to his debts, and to legacy duty.

[If a man die without having made a will of his personal property, he is said to have died completely *intestate*. If he have made a will, but appointed no executor, or the appointment fail, he is said to have died *quasi* intestate. The appointment of an executor may fail, when the person named refuses to act; or dies before the testator, or before performing the will; or when, on other accounts, he is, or becomes, incapable of acting; or when he dies after having proved the will, or before having administered all the effects.—In all these latter cases, as well as when no

executor has been appointed, the ordinary must grant an administration, which is called—administration with the will annexed; and in the last instance, also called administration *de bonis non, i.e.* of the goods *not yet* administered. The office of such an administrator differs little from that of an executor: and the will must be proved (to which its validity under the statute is essential) as though probate were taken out by an executor.

[In the case of a complete intestacy, with neither will nor executor, the ordinary appoints an administrator, generally; being an officer of the ordinary, appointed in pursuance of the statute, and whose title and authority are derived exclusively from the Ecclesiastical judge, by grants usually termed Letters of Administration. But a very material question here arises,—to whom ought so serious a trust to be confided?

[Blackstone traces the progress of the law relating to the effects of intestates, in the text to which reference has been already made. It must here suffice to say, that the family, the relations, and the creditors of intestates are, or may be, vitally interested in having his effects lawfully administered. By statute 31 Edward III., c. 11, it was enacted that "the ordinaries shall depute, of the *next and most lawful friends* of the person dying intestate, to administer his goods." The power of the ecclesiastical judge was a little more enlarged by stat. 21 Hen. VIII., c. 5, § 3; which provided that in case any person died intestate, or that the executors named in any testament refuse to prove it, the ordinary shall grant administration, "*either* to the widow of the deceased, *or* to the next of kin; *or* to both, as by the discretion of the same ordinary shall be thought good." The same section proceeds to enact, that when divers persons claim the administration as next to kin, which be equal in degree of kindred to the testator, or person deceased; and where any person only deriveth the administration as next of kin, where divers persons be in equality of

kindred as is aforesaid, that in every such case the ordinary be at his election, and liberty to accept any one, or more, making request, where divers do require the administration.

[Thus the Ordinary is compellable to grant administration of the goods and chattels of the wife to her husband, or his representatives; and of the husband's to his widow, or next of kin: but to either, or both, at his discretion. Of kindred, those nearest in degree to the intestate must be taken; but he may select which he pleases, of several in equal degree:—the nearness of degree being reckoned according to the computation of the civilians. In the first place the children, or on failure of any, the parents, are entitled;—then follow brothers and sisters; then grandfathers and grandmothers; then uncles and nephews, or aunts and nieces; and lastly cousins. There is no distinction between kindred of the half blood and the whole; nor preference between relatives *ex parte paternâ*, and *ex parte maternâ*, standing in the same degree of kindred to the deceased. If none of the kindred will take out administration, a creditor may, by custom;—and in default of all such, the Ordinary may commit the administration to such discreet person as he may approve of. If an illegitimate person die intestate, and without wife or child, the proper course is, for some proper person to procure letters patent, or other authority from the crown; and then the ordinary grants him administration.

[An administrator must enter into a bond, with sureties faithfully to execute his trust; and has, from the date of his appointment, the same right to, and power over, all the personal estate of the intestate, as his executors would have had, if there had been a will, appointing them.

[An executor or administrator's duty is, First, to bury the deceased in a manner suitable to the estate which he has left behind him: for which purpose he should lose no time in ascertaining the nature and extent of it. *Necessary* funeral expenses are allowed previous to all other debts and

charges. If he be extravagant, he will have himself to answer for it, when challenged by those affected by it.

[Secondly. The will must be proved in due form.

[Thirdly. An inventory is to be made of all the goods and chattels, and chattels real, of the deceased.

[Fourthly. All such goods and chattels must be collected as promptly as possible.

[Fifthly. The debts of the deceased must be paid, observing the rules of legal priority.

[Sixthly. When the debts are duly discharged, and not till then, the legacies must be paid, as far as the assets extend; but there is a great distinction between a specific and a general legacy; that if the assets be insufficient to pay the debts and *specific* legacies, in full, the general legacies must abate, as it is called. A residuary legatee has no right to call on particular general legatees to abate. If a legatee die before the testator, the legacy is a lapsed one, or falls into the residue; but a testator may, if he choose, prevent a legacy from lapsing. Nor can an executor be forced to pay a legacy within a year, though the testator has directed it to be paid sooner.

[Seventhly. When all the debts and particular legacies are paid, the *residue* must be paid to the residuary legatee; or, if it do not appear from the will, that the executor was intended to have the residue, he must hold it as trustee for the next of kin.

[Eighthly. In the case of *Intestacy*, and of there being a residue in the hands of the administrator,] by statute 22 & 23, Car. II. c. 10, explained by 29 Car. II. c. 3, it is enacted, that the surplusage of intestate's estates, except of femes covert, which are left as at common law, shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. *One third* shall go to the *widow* of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants; if there are no children or

legal representatives subsisting, then a *moiety* shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. By this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide the effects in equal portions.

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum;* and which Sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding, in point of conscience at least, upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato;* which, and because the act was also penned by an eminent civilian, has occasioned a notion that the parliament of England copied it from the Roman prætor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law: which prevailed as an established right and custom from the time of king Canute downwards. So likewise there is another part of the statute of distributions, where directions are given that no child of the intestate, except his heir at law, on whom he settled in his lifetime any estate

in lands, or pecuniary portion equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law: which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland.

[A bill is now (1855) before parliament for abolishing the existing testamentary jurisdiction of all the Ecclesiastical and Peculiar Courts in England and Wales, and establishing in lieu of them a distinct court of Probate and Administration, and otherwise amending the law in relation to matters testamentary. It is proposed to call the new court "The Testamentary Court," and to arm it with jurisdiction over such matters, equal to that exercised by the Court of Chancery.]

CHAPTER XLVIII.

FRAUD.

[FRAUD will vitiate everything; by which is signified, that no one shall, as far as the law can prevent it, be allowed, by his own fraud or that of his agent, to acquire a right, escape a liability, or impose an obligation on another. The law exerts its utmost astuteness to detect and defeat fraud, wherever it may lurk, and whatever form it may assume, or device it may adopt.

[Fraud, however, must not be presumed, but proved: honesty and good faith being in the first instance presumed, as innocence, instead of guilt. And mere suspicion is not proof; for the existence of fraud must be established by such clear and satisfactory *evidence*, as satisfies the court or a jury, that the presumption of honesty and good faith, in the challenged transaction, is rebutted and overcome. Fraud may be perpetrated without a word being said or written; the law, in trying the existence of such,—as indeed in all fraud, whether active or passive,—watching the surrounding circumstances of the case, and weighing carefully motive, interest, and the object to be attained; as well as the intrinsic probability or improbability of any statements made by either party, and their consistency, or inconsistency with extrinsic and well-established facts.

[The Romans called fraud, *Dolus malus;* distinguishing

between it, and *Dolus bonus*, or *Solertia*. The former they held to include every kind of artifice, guile, or machination intentionally employed for the purpose of deception, cheating, or circumvention, in order to advance the interests of the person resorting to it, at the expense of him against whom it is used. *Dolus bonus*, or *Solertia*, indicated that degree of artifice, or astuteness, which a person may lawfully employ to advance his own interest, in self-defence, for instance, against an enemy, or for some other justifiable purpose."

[It follows from this that in the transactions of life, and especially of commerce, while the law endeavours to repress dishonesty, it expects every one to be reasonably cautious and vigilant: which may be deduced from two well-known maxims of the Civil law, implicitly adopted by our own: *Caveat Emptor;* and *Vigilantibus, non dormientibus jura subveniunt*.* It would surprise all but practical lawyers, to see how incessantly persons are found striving, by litigation, to attach the imputation of fraud to others, when the true solution of the loss or injury complained of, is to be found in their own carelessness, and negligence.

[It may be received as a general rule, that any false statement knowingly made, with a view to induce another to alter his condition, and thereby altering it, is a fraud in law.† Nor is it necessary that the former should be benefited by the fraud, or collude with him who is.‡

[Fraud usually consists in either the misrepresentation, or concealment by a person, of a material fact, peculiarly within his knowledge, in consequence of which a delusion exists in the mind of another; or using a device naturally calculated to lull the suspicions of a careful man, and induce him to forego enquiry into a matter upon which

* See these maxims clearly and ably explained in Broom's Maxims, pp. 605 *et seq.* (2nd Ed.)

† *Murray v. Mann*, 2 Exch. 538. Per Parke, B.

‡ *Pasley* v. *Freeman*, 3 T. Rep. 51. 2 Smith's L. C. 55.

the other party has information, although such information be not exclusively within his reach.

[Moral fraud, in a representation, is essential in order thereby to invalidate a contract, or furnish ground of action; and to constitute such moral fraud, it is not necessary that the representation should be false to the knowledge of him who makes it. If untrue in fact, and *not believed by himself to be true*, and made for a fraudulent purpose, it is both a legal and a moral fraud.* If, however, the bargain be merely a fair contest, or trial of judgment, there can be no fraud; for either party naturally attempts to obtain the advantage.

[Fraud, in contemplation of law, is actual or constructive. Of the former we have already spoken. By the latter is signified such acts, or contracts, as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, to violate private or public confidence, or injure the public interest, deemed equally reprehensible with positive fraud, and therefore prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*. The doctrines on this subject may seem to be of an artificial and arbitrary character, yet are founded on an anxious desire of the law to apply the principle of preventive justice, so rather as to shut out the inducements to perpetrate a wrong, than rely on mere remedial justice after that wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress those temptations and encouragements which might otherwise be found too strong for their virtue.†

[Fraud is cognizable, civilly and criminally: in the former case, in courts of law and equity: in the latter, in a court of common law, administering criminal justice.

[In a court of law, fraud confers no right of action,

* See the cases collected in 2 Smith's L. C. 81—83. (4th Edit.)

† See 1 Story's Equity Jurisp. pp. 213, 4.

except for damages against one who has committed it: while it is available as a defence against any demand or cause of action at the instance of such a person.

[Fraud renders a contract or purchase not actually void, but only voidable at the election of the party defrauded, whom it gives a right to rescind either: and in the case of a sale of goods, it is too late to declare such election, after they have passed into the hands of a *bonâ fide* purchaser, not cognisant of the fraud by which they had been obtained. If such goods could be followed through any number of *bonâ fide* purchasers, a negligent vendor might give a fraudulent vendee unlimited means of defrauding the rest of the world.* The election to rescind a contract on the ground of fraud, must be exercised as soon as it is discovered; for if, after that, the person defrauded deal with the subject-matter of the contract, the right to rescind is waived, and cannot be revived by the mere discovery of a new incident strengthening the evidence of the original fraud. It is not necessary for a person to know all the incidents of a fraud, before he deprives himself of the right of rescinding.†—Actions and defences founded on fraud are continually defeated through non-observance of these rules.

[In a court of equity, every contract or instrument whatever, tainted with fraud, may be set aside and nullified; nor will concealment or lapse of time avail the perpetrator except in cases of negligence in the party defrauded. By the 26th section of the statute for the limitation of actions and suits relating to real property, it is enacted, that *in any case of a concealed fraud*, the right of the person injured by it to sue in the court of equity for the recovery of property, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might

* *White* v. *Garden*, 10 C. B. 919. *Stevenson* v. *Newnham* (in error), 28 January, 1853. 22 Law I. N.S. C.P. 115.

† *Campbell* v. *Fleming*. 1 Ad. & Ell. 40.

have been first known or discovered: but an innocent *bonâ fide* purchaser for valuable consideration, who has not assisted in the fraud, will not be liable to such suit. The following was the language of the late Lord Cottenham, on the subject of lapse of time in the case of fraud, and adopted by Lord Campbell, in delivering judgment in a recent case in the House of Lords.

"It does, indeed, become the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, I think time has no effect. Were it otherwise, the jurisdiction of the court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed, as to prevent the interference of the court. Such, fortunately, is not the law; and those who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder; but that their children's children will be compelled by this court to restore it to those from whom it had been fraudulently abstracted."

[Fraud is cognisable criminally, at common law, when it is such as affects the public: being public in its nature, calculated to defraud numbers, or deceive the people in general; of which a common instance is, cheating by false weights and measures, against which it is said that ordinary care or prudence is not sufficient to guard.* Such also is the case with conspiracy, forgery of certain instruments, and false tokens. In such cases,—of "any cheat or fraud punishable at common law," statute 14 & 15 Vict. c. 100, § 29, now enables the court to sentence to hard

* *Charter v. Treveylan*, 11 Clark and Finn. 740.
† 2 East Pleas of the Crown, 816, 7.

labour during the whole or any part of the term of imprisonment.

[The ordinary instance of fraud criminally cognisable by statute law, is that of *obtaining* any money, goods, or securities by false pretences. This, by statute 7 & 8 Geo. IV. c. 29, § 53, is a *statutable* misdemeanour, punishable now by four years' penal servitude, fine, or imprisonment, with or without hard labour; and the ineffectual *attempt* so to obtain, is itself a misdemeanour at common law, punishable under the statute of Victoria, with hard labour, as well as imprisonment.]

CHAPTER XLIX.

SLANDER AND LIBEL.

[WE have seen, in a previous chapter,* that character and reputation are vindicated by the law, against the arts of detraction and slander; and the mode of doing so was briefly indicated. It is proper now to do so more distinctly; and it will be found that this section of our laws has lately undergone a great and salutary change.

[Slander is the spoken, and Libel the written, defamation of another; and each is subject to rules very important to those who seek, or occasion others to seek, redress for injuries of this description. First, then, of SLANDER. There are two classes of slanderous words: those actionable in themselves, and those which, though of a disparaging or defamatory character, become actionable only because they have occasioned special damage. Of the former class are words—imputing to a man some crime punishable in the temporal courts; or, tending to exclude him from society; or, to injure him in the profession, trade, or calling, by which he gains his livelihood; or, disparaging him in an office of public trust. The law *presumes* all such words to have a natural and necessary tendency to injure the person of whom they have been spoken; and allows him to sue for damages, without proving that any have been in fact occasioned. Thus, to say of a man "you have committed a crime for which I can transport you;" to say that he has

* *Ante*, p. 102, c. xii.

an infectious complaint; to call a lawyer a knave, a physician a quack, or a tradesman a bankrupt (for the fact of his being in trade, stands in the place of special damage); * or charge a magistrate or judge with corruption, is actionable of itself. Of the second class are all words of a defamatory character, which are naturally calculated to occasion, and do occasion, damage to the person of whom they are spoken. The uttering of words not of such a character or tendency, is not unlawful, even though followed by special damage. If they be innocent of themselves, there is no ground for imputing, nor can a jury infer, malice.† It is, however morally reprehensible, mere *damnum absque injuriâ.* It would be absurd and unjust, to hold the speaker of such words responsible for an injury which a third party is capricious or foolish enough to inflict, because of them, on another.

[LIBEL is written, or printed slander, or by pictures or signs. To *write and publish*, maliciously, anything of another, which either makes him ridiculous, or holds him out as a dishonest man, or tends to hinder mankind from having intercourse with him, is actionable, and criminally punishable, when the mere speaking of such words would not be so; because writing is a more deliberate act, and evidences more malice, than mere speaking. The natural tendency of such an act is to defame and injure, and the law will presume that such injury was intended; for every man is presumed to intend the natural and ordinary consequences of his own act: and it would be a misdirection if a judge were to leave it to the jury to say whether the defendant intended to injure the plaintiff by the publication.

* Per Williams J., *Rolin* v. *Steward*, 14 C. B. 603. To say of a trader, "If he does not come and make terms with me, I will make a bankrupt of him, and ruin him!" is actionable in itself, necessarily implying that the speaker has the power of carrying the threat into execution. *Brown* v. *Smith*, 13 C. B. 596.

† *Kelly* v. *Partington*, 5 B. & Ad. 649. (*Per* Scarlett, afterwards Lord Abinger, *arguendo*.)

This fundamental distinction may be illustrated by the use of the word "swindler." It is not actionable to *say* that a man is a swindler (unless it be spoken with relation to his trade or business); but it is, if written or printed, and published. Again, it is to be observed that there is a difference between publications, relating to public, and to private individuals—whether they *be* libels. Every subject has a right to comment freely, and even severely, on those acts of public men, which concern him as a subject of the realm; provided he do not make his commentary a cloak for malice or slander: but any imputation of wicked or corrupt motives, is unquestionably libellous.*

["Judges anciently," said Lord Hardwicke, "to discourage little frivolous actions, used their utmost endeavour to explain away the most opprobrious words; but this was certainly wrong; and as the character and reputation of mankind are under the protection of the law, as well as their estates, we ought to do equal justice to both, and take care that neither the one nor the other shall be injured. The question then is, whether the words spoken do import any slander or reproach for which an action lies." Words are now taken in their ordinary and appropriate sense, plainly and popularly, as the rest of the world would understand them. And further, the use of words imputing an indictable offence, is actionable or not, according to the sense in which they may fairly be understood, by by-standers not acquainted with the matter to which they relate, or which may render them a privileged communication; and the secret intention of the speaker, in uttering them in the presence of such by-standers, is altogether immaterial.† The ordinary sense of written or spoken words, is to be taken as the meaning of the speaker or writer, unless something be shown to have taken place, which may give a peculiar character to the expression: and as soon as a foundation has been laid, by

* Per Parke B., *Parmiter* v. *Coupland*, 6 Mee. & Wels. 108.
† *Hankinson* v. *Bilby*, 16 M. & W. 442.

adducing such evidence, and not before, a witness may be asked the question, "What did you understand by the words?"*

[It is a question of fact for a jury, whether the particular publication amount to a libel, according to the distinctions above laid down. A judge may, if he choose, state his own opinion to the jury, or define what constitutes a libel; but he is not bound to do so. The proper course, however, is said by Mr. Baron Parke to be, for the judge to define to the jury what a libel is, in point of law; namely, the publication without justification, or lawful excuse, of matter calculated to injure the reputation of another, by exposure to hatred, contempt, or ridicule; and then leave it to the jury to say, whether the publication in question fall within that definition.† If, however, the libel be the subject of a prosecution, the judge is bound to define the crime, as in the case of all other offences, and the jury must find whether the facts necessary to constitute that crime, have been proved to their satisfaction: and this has been the course for a long time, whether the libel be the subject of a criminal prosecution, or civil action.‡ Mr. Fox's libel act (32 Geo. III. c. 60) which was a declaratory one, simply putting prosection for libel on the footing of other criminal cases, declares and enacts, that on Not guilty, on an Indictment or Information for a Libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court, to find the defendant guilty, merely on proof of the publication, and of the sense ascribed to the same in the indictment or information: provided that the court shall give their opinion and direction to the jury in the matter in issue, as in other criminal cases; and the jury may also, in their discretion, find a special verdict.

[It is actionable also to slander a man's title to his

* *Daines and Braddock* v. *Hartley*, 3 Excheq. 200.

† *Parmiter* v. *Coupland*, ante p. 469. ‡ Id. p. 108.

property, by uttering false and malicious statements concerning it, from which special damage necessarily or naturally* ensues; but it is essential to prove that the defendant made the false statement, *malâ fide*, with actual malice —influenced by a malicious intention to injure the plaintiff,† and that the special damage ensued from it. A mere false statement, without malice, will not suffice.‡ It is necessary to show a *publication*, by the defendant, of the slander or libel; and the mode of that publication may materially affect the damages. The mere parting with a libel, with an intention of publishing, whereby a defendant loses all future control over it, seems to be a publishing of it: but the merely sending a private letter, addressed to the plaintiff himself, and delivered into only his own hands, is no publication, for the purpose of an action. It is a publication, however, to send a letter libelling the plaintiff, to his wife; because husband and wife, though one person in point of law for many purposes, are different persons, for the purpose of having a man's feelings injured by communications made to his wife.§ Publication of libels in newspapers, is proved by the production and proof of a certified copy of the affidavit required by stat. 6 & 7 Will. c. 76, and a newspaper corresponding, in the title, and names and descriptions of printer and publisher, with those mentioned in the affidavit.

Even, however, if words be spoken or written of another, which are disparaging, defamatory, and occasioning special damage, yet they will not be deemed *malicious*, so as to afford ground for an action, if so spoken or written in a friendly manner, as by way of advice, admonition, or counsel, without any tincture or circumstance of ill-will, to one who asks, or has a right to expect it:‖ for the law will not favour, or protect, an officious and intrusive volunteer.

* *Haddon* v. *Lott*, 24 L. J. N. S. C. P. 48.

† *Pater* v. *Baker*, 3 C. B. 831. ‡ *Brook* v. *Rawl*, 4 Exch. 524.

§ *Wenman* v. *Ash*, 22 Law Journ. N. S. 190. C. P.

‖ Per Bayley J., in *Brommage* v. *Prosser*, 4 B. & C. 256.

[And, moreover, the same rule applies to words written or spoken on such a lawful occasion, as rebuts the *primâ facie* inference of malice arising from a statement derogatory to private character, as in giving the character of a servant. Here, besides proof of the words, malice in fact must be shown, as that the defendant knew that what he said was false: otherwise it is held a "privileged communication;" which comprehends all cases of communications made *bonâ fide*, in pursuance of a duty, or with a fair and reasonable purpose of protecting the interests of the party uttering the defamatory matter.* The *absence* of malice in such a case, must be presumed, till proof is given of its presence. Express malice may be shown not only by extrinsic evidence, but by the intrinsic evidence afforded by the libel itself, to the jury.†

[Beyond this, also, if the defamatory words be *true*, then however defamatory, and however great special damage has ensued, and whether they were or were not spoken on a justifiable occasion, the law deems them justifiable; and a plea of the truth is an answer to the action, conformably with the rule of the civil law: *eum qui nocentem infamat, non est æquum et bonum, ob eam rem condemnari: delicta, enim, nocentium, nota esse opportet et expedit.*

[And here we arrive at the recent salutary change alluded to at the opening of this chapter. In the year 1843 was passed the statute 6 & 7 Vict. c. 96, commonly called Lord Campbell's Act. It is intitled "An Act to amend the law respecting Defamatory Words and Libel;" and its enactments are made "for the better protection of private character, for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty." This act is among the most admirable on our statute books, and its provisions cannot be too widely known.

* *Somerville* v. *Hawkins*, 10 C. B. 583.
† *Gilpin* v. *Fowler* (in error), 23 Law Journ. N. S. Exch. 152.

[To encourage those who have injured others by defamation, to make amends as promptly and effectually as they can, by offering an apology, a defendant may shew, but only *in mitigation of damages*, that he made or offered an apology, before, or as soon after the commencement of the action, as he had an opportunity; but he must (stat. 6 & 7 Vict. c. 96, § 1), when delivering his plea, give written notice to the plaintiff of his intention to do so.

[In an action for a libel in a newspaper, or periodical publication, the defendant may *plead* that the libel had been inserted without actual malice or gross negligence; and that before the commencement of the action, or at the earliest opportunity afterwards, he had inserted a full apology for the libel;—or that if the publication was at intervals exceeding a week, he had offered to publish the apology in any newspaper or periodical publication to be selected by the plaintiff; and (stat. 8 & 9 Vict. c. 75, § 2) at the time of pleading, the defendant must pay into court a sum of money by way of amends for the injury sustained by the publication complained of. In ordinary actions for libel, and in all actions for slander, the defendant is precluded from paying money into court, by way of compensation or amends (stat. 15 & 16 Vict. c. 76, § 70): but this section expressly declares that it is not to affect the provisions of the statutes mentioned in the text. The reason of the exception is, that the fear of having to go before a jury, on the subject of damages, may operate as a wholesome restraint on recklessness and malice. To this plea the plaintiff may reply generally, denying the whole or any part of it.*

[In an Indictment or Information, the defendant may plead as a *defence*, alleging the truth of the charge, and further, that it was for the public benefit that the matters charged should have been published; alleging the

* *Chadwick* v. *Herapath*, 3 C. B. 885.

particular fact, or facts, by reason of which it was for such public benefit. To this plea, the prosecutor may reply generally, denying the whole of it. If a conviction shall ensue, the court, in passing sentence, may consider whether the defendant's guilt has been aggravated, or mitigated, by the plea and evidence offered in support of it. The defendant may, in addition to this special plea, plead not guilty, and avail himself of every defence formerly open under it. Under this latter plea, in an indictment or information,* if evidence be given establishing a presumptive case of publication against the defendant, by the act of any other person by the authority of the defendant, the latter may prove that the publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution, on his part.

[In an indictment, or prosecution, by a private prosecutor, if judgment be given for the defendant, he is entitled to his costs; but must pay those incurred by the prosecutor, who succeeds on a special plea of justification.

[If any person shall publish, or threaten to publish any libel; or directly or indirectly threaten to print or publish, or to abstain from doing so, or offer to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money, or security for money, or any valuable thing; or to induce any person to confer or procure for any person any appointment or office of profit or trust; any such person, on conviction, shall be liable to imprisonment, with or without hard labour, for any time not exceeding three years. Every person convicted of maliciously publishing any defamatory libel, *knowing it to be false*, shall be liable to be imprisoned for any term not exceeding two years, and such fine as the court shall award; and any person *maliciously* publishing any defamatory libel, shall be liable to either fine or impri-

* This act does not extend to Scotland, § 10.

sonment, or both, as the court may award; the imprisonment not to exceed one year.

[Such are the means taken by the legislature at once to protect private character, and both secure the liberty of the press, and better prevent abuses in exercising it.

[The memorable contest between the House of Commons and the Queen's Bench, A.D. 1837—1840, occasioned by the case of *Stockdale* v. *Hansard*, has been already adverted to.* The House of Commons boldly claimed, as one of their privileges, the power of ordering its proceedings to be published and sold, notwithstanding they might contain matter defamatory of the character of individuals; but when the right was challenged by a plaintiff in an action for libel, before Lord Denman, he sternly denied the existence of any legal justification afforded by such privilege; saying to the jury, "I am not aware of the existence, in this country, of any body whatever which can privilege any servant of theirs to publish libels of any individuals." This provoked great demonstrations of anger and alarm for the safety of their "privileges," on the part of the House of Commons; but the court of Queen's Bench remained firm, and solemnly upheld the doctrine of Lord Denman. The contest, as may be seen in a former chapter, having proceeded to an unseemly height, was at length terminated by the statute 3 & 4 Vict. c. 9; entitled, "An Act to give summary protection to persons employed in the publication of parliamentary papers," passed on the 14th April, 1840. It enacts that all civil or criminal proceedings against persons for the publication of papers printed by order of both or either House of Parliament, be stayed on delivery of a certificate and affidavit, to the effect that such publication is by order of either House: and thereupon the court or judge shall immediately stay the proceeding, civil or criminal; and thereupon every suit or process therein shall be deemed

* Ante p. 128.

and taken to be finally put an end to, determined, and superseded, by virtue of that act. The same provisions extend to the case of publishing a *copy* of any such proceedings; and the printing an *extract* or *abstract* of them may be shown, under a plea of not guilty, to have been published *bonâ fide* and without malice: and if the jury be of that opinion, a verdict is to be entered for the defendant.

[The act concludes, however, with the proviso, expressly *declaring* and enacting, "that nothing contained in it shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of parliament in any way whatever:" thus leaving the matter in a very unsatisfactory state.

[When the judges of the court of Queen's Bench delivered their judgments, in the great case of *Stockdale* v. *Hansard*, on the 31st May, 1839, the whole bar rose up in testimony of respect and admiration, as each judge concluded the reading of his judgment.* One of them, that of Mr. Justice Patteson, contains the following weighty words, enunciating a great principle of constitutional law.† "Privileges—that is, immunities and safeguards,—are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive the greatest benefits from the exercise of these functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives, as to the due exercise of these privileges. But *power*,—and especially the power of invading the rights of others, is a very different thing. It is to be regarded, not with tenderness, but with jealousy; and unless the legality of it be most clearly established,

* See them in 9 Adol. & Ell. 107—243. † Id. p. 214.

those who act under it must be answerable for the consequences."

[For the protection of the public against a licentious exercise of the liberty of the press, stringent regulations are prescribed by the legislature for the purpose of insuring responsibility, on the part of the proprietors, and affording facilities for the necessary proofs in case of its becoming necessary to institute legal proceedings against them.*

[It may be gathered from what has gone before, that an action for damages may be maintained, in the case of spoken or written defamation; and that an indictment may be sustained in the latter case. The court of Queen's Bench will grant a criminal information, provided the libel reflect on the administration of justice,—by jurors, judges, mayors, justices of the peace, &c., for what they have done in the execution of their respective offices:—or, if the libel be on persons high in office, under government, or of high rank, or in parliament;—or in cases against private individuals, † if attended with circumstances of great aggravation, and even for slanderous *spoken* words, if intended to provoke a breach of the peace: for then the offence actually committed, is transformed into one of a different sort; ‡—and for publications in this country tending to degrade, revile, and defame persons in high power in foreign countries,—especially when such publications tend to disturb the pacific relations between the two countries;—and also for printing or publishing obscene or blasphemous libels.

* Stat. 6 & 7 Will. 4, c. 76, §§ 6, 7, 8. *Ante* p. 471.

† The moving for a rule for a criminal information, which is afterwards discharged on shewing cause, will not prevent the applicant from bringing an action in another court, for the publication of the same libel, unless such other court can be satisfied that the action is brought against good faith. *Wakley* v. *Cooke and Another*, 16 M. & W. 822.

‡ *Exp. Chapman*, 4 Ad. & Ell. 773. *Exp. Duke of Marlborough*, 5 Q. B. 955.

[An action for libel or slander, which cannot except *now by consent*,* be entertained by the county courts, established by statute 9 & 10 Vict. c. 95, (see § 58), must be brought in one of the three superior courts, or certain inferior courts of record;—but a great restraint is imposed on persons disposed to harass others by frivolous actions of this kind. By virtue of statute 21 Jac. I. c. 16, § 6, if, in an action for spoken slanderous words (which mean words actionable in themselves), the jury, in any court whatever that has jurisdiction to try such action, assess the damages under 40*s*., then the plaintiff shall recover only so much costs as the damages amount to, and the judge has no power to certify to give him costs. If, however, the words are actionable only by reason of special damage, or be slander of title, or written slander, then, under the recent statute 3 & 4 Vict. c. 24, § 1, if the plaintiff recover less damages than 40*s*. on either trial, or judgment by default, he will be entitled to no costs whatever, unless the judge or other presiding officer immediately afterwards certify on the back of the record or writ of trial, that the grievance was "wilful and malicious"—that is, imported personal malice and ill-will, on the part of the defendant, towards the plaintiff.

[It is necessary that extreme caution should be exercised in repeating defamation uttered by another, for it will afford no justification, in an action of libel, that the libellous matter had been previously published by a third person; that the defendant, at the time of *his* publication disclosed the name of that third person; and believed all the statements contained in the libel to be true.† It was once thought that this would afford a defence, in the case of oral slander; but there can be little doubt that it would now be ruled otherwise: that if the statement could not be held privileged, by reason of its having been made on a

* *Post* p. 516. † *Tidman* v. *Ainslie*, 10 Exch. 63.

justifiable occasion, it would, at most, be available in mitigation of damages.

[Thus stands the law concerning Slander and Libel: its object being to restrain malicious, censorious, and defamatory tongues and pens, without encouraging irritable and vindictive temperaments; but at the same time affording ample protection and compensation in the case of substantial wrong.]

CHAPTER L.

MALICIOUS ARREST; MALICIOUS PROSECUTION; FALSE IMPRISONMENT.

[So tender is the law of the liberty of the subject, in respect of both person and character, that it behoves every one to be cautious about invading his rights in respect of either; not to act precipitately or passionately, in proceeding to deprive another, under even the gravest suspicion of misconduct, of his personal liberty, or stamp upon him the odious impress, and visit him with the anxiety and peril, of a public accusation of crime. If a man choose to indulge a vindictive spirit, he must at all events be prepared to pay for it, and perhaps very heavily, in damages.

[I. Actions for malicious arrest are, in respect of civil proceedings, in the course of an action. The occasion for these has become less frequent, since the abolition of arrest on mesne process, *i.e.* at the commencement of an action. Arrest before judgment is no longer allowable, except under special circumstances, and under the authority of a judge's order, obtained on affidavit. If a man, however, be arrested maliciously, and without any reasonable or probable cause, whether on mesne process or in execution of a judgment, he may bring an action to recover damages; for there is no distinction between either case, with respect to the plaintiff's right of redress.* But no action will lie for simply

* *Churchill* v. *Siggers*, 3 Ellis & Bl. 939.

bringing an action improperly, as in the name of a third person, unless it be alleged and proved to have been done maliciously and without probable cause, and there have been also a legal damage sustained; for when an action is improperly brought, the costs which the opposite party obtains are, in law, a compensation for the wrong.*

[II. A malicious prosecution on a criminal charge, affords a cause of action for damages, if the plaintiff can prove concurrent malice, and want of probable cause, on the part of the defendant; together with an injury inflicted on the plaintiff by the prosecution, in either his person by imprisonment, his reputation by the scandal, or in his property by the expense. If unable to do this, he cannot maintain the action; for were it otherwise, no one would venture to bring a criminal to justice. The prosecuting a person, however, with any other motive than that of bringing a guilty party to justice, is a malicious prosecution in law.† "Malice," said Mr. Justice Bayley,‡ "in common acceptation, means ill-will against a person; but in its legal sense means, a wrongful act, done intentionally, without just cause or excuse."

[The great question in actions of this nature, is the presence or absence of malice, and of reasonable and probable cause for the prosecution: which is a mixed proposition of law and fact. It lies on the plaintiff, to establish the existence of malice, and the want of probable cause. For this purpose, it is necessary to shew the jury facts from which these deductions may be made: for if there be no facts, nor any inference from facts in dispute, "reasonable and probable cause" is a pure question of law, and if the judge think there *was* such cause, he may nonsuit the plaintiff.§ If there be such facts, they must be left

* *Cotterell* v. *Jones and Ablett*, 11 C. B. 713.

† *Stephens* v. *Midland C. Railway*, 18 Jurist, 933.

‡ *Bromage* v. *Prosser*, 4 B. & C. 255.

§ *Blackford* v. *Dod*, 2 B. & Ad. 179.

to the jury; to find, however numerous or complicated, whether they, or other facts inferred from them, exist; and if the jury find that they do, it is then for the judge to determine, as a matter of law, whether the facts proved constitute reasonable and probable cause. Nothing is to be left to the jury, but the truth of the facts, and the justice of the inferences to be drawn from them: but the knowledge, belief, acts, and conduct of the defendant, at the time of the transaction enquired into, are essential facts for the consideration of the jury,* who must try, as it were, to dive into the defendant's heart, to see his motives. A recent case † well illustrates the state of the law on this important question. "Among the facts to be ascertained," said the court, "there is the defendant's knowledge of the existence of those tending to show reasonable and probable cause, because without knowing, he could not act upon them; and also *his belief* that they amounted to the offence which he charged; because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding." The defendant, however, though cognisant of reasonable and probable cause, may not have thought it such, and acted without such belief, from only malicious motives: but it is incumbent *on the plaintiff* when once the existence of reasonable and probable cause has been established, to prove the absence of that belief.‡ A jury may be asked the question, whether the defendant believed there was reasonable and probable cause for the prosecution? and if they find in the negative, the judge may then rule,

* *Panton* v. *Williams*, 2 Q. B. 169.
† *Turner* v. *Ambler*, 10 Q. B. 260.
‡ *Broad* v. *Ham*, 5 New Cas. 722.

that in point of law there was no such cause. They may also be told, that if on the evidence they believe that the defendant acted from an improper motive, they may infer *malice*.* It is essential that evidence of such malice be given: and the want of probable cause is only presumptive evidence of malice.

[So anxious is the law, to distinguish between the provinces of the jury, and the judge; and on such nice distinctions depend questions often called into existence, solely through rashness and obstinacy.

[III. False imprisonment, is a restraint on the liberty of the person, without lawful cause, by confinement in either prison, stocks, a house, or even forcibly detaining the party in the street against his will. And here it is proper to point out, as a matter of general importance to be known, that a private person is not justified in arresting, or giving in charge to a policeman, without a warrant, one who has been engaged in an affray, unless it be still continuing, or there be reasonable grounds for believing that he intends to renew it.† Imprisonment means, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. If one man merely obstruct the passage of another in a particular direction, whether by threat of personal violence, or otherwise, leaving him at liberty to stay where he is, or to go in any other direction, if he please, he cannot be said to *imprison* him.‡ He does him wrong, if he had a right to pass in that direction, and would be liable to an action for obstructing the passage, or of assault, if on the party persisting in going in that direction, he touched that party's person, or so threatened him as to amount to an assault: which last may consist

* *Haddrick* v. *Hislop*, 12 Q. B. 267.

† *Price* v. *Seeley* (House of Lords,) 10 Cl. & Finn. 28.

‡ *Bird* v. *Jones*, 7 Q. B. 752. [Lord Denman strenuously dissented from the other judges in this case.]

of a threat of violence, exhibiting an intention to assault, and a present ability to carry the threat into execution.* The remedies for a false imprisonment are twofold; by an action for damages, or by habeas corpus, for a restoration to liberty, as will be explained in the next chapter.

[The legislature has not been pleased to allow a defendant to pay money into court in actions for malicious arrest, or prosecution, or false imprisonment: † and no action for a malicious prosecution can be brought in a county court.‡]

* Per Jervis, C. J., *Read* v. *Coker*, 13 C. B. 860. In this case, the plaintiff was in the shop of the defendant, and on refusing to quit when desired, the defendant and his servants surrounded him, and tucking up their sleeves and aprons, threatened to break his neck if he did not go out. On this the plaintiff, apprehensive of violence, left. This was held to be an assault.—A *battery*, which always includes an assault, is an injury actually inflicted on the person of another, with the hand, or any instrument—as by throwing water—whether wilfully or not; and without regard to the degree of violence, except as influencing the damages which a jury may award.

† Stat. 15 & 16 Vict. c. 76, § 70.

‡ 9 & 10 Vict. c. 95, § 58.

CHAPTER LI.

THE WRIT OF HABEAS CORPUS.

[3 Bla. Com. 129—130.]

THE writ of *habeas corpus* [which has been incorporated into the jurisprudence of every State of the Union in America] is the most celebrated writ in the English law. Of this there are various kinds, made use of by the courts at Westminster, for removing prisoners from one court to another, for the more easy administration of justice.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,—i.e.* "to do, submit to, and receive" whatsoever the judge, or court awarding such writ, shall consider in that behalf. This is a high prerogative writ, issuing out of any of the superior courts at Westminster, including the court of chancery, not only in term time, but also during the vacation, and running into all parts of the queen's dominions: for she is at all times entitled to have an account, why the liberty of any of her subjects is restrained, wherever that restraint may be inflicted. If the writ issue in vacation, it is usually returnable before the judge

himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in court. And since the statutes 16 Car. I. c. 10 [and 56 G. III. c. 100], every subject of the kingdom is equally entitled to the benefit of the common law writ, in either the queen's bench, common pleas, exchequer [or court of chancery], at his option.

It is necessary to apply for the writ by motion to the court, or application to a judge, supported by an affidavit of the facts, as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus*, *&c.*) which do not issue of mere course, without showing *some probable cause* why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan, "it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because, when once granted, the person to whom it is directed, can return no satisfactory excuse for not bringing up the body of the prisoner. So that, if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the queen's service, a wife, a child, a relation, or a domestic confined for insanity, or other prudential reasons, might obtain temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore, sir Edward Coke when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing upon his own showing, sufficient grounds to confine him. On the other hand, if a probable ground be shown, that the party is imprisoned without just cause, and therefore, hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be

denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the queen, or privy council, or any other.

In a former chapter, the personal liberty of the subject was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case, without the special permission of law. This is a doctrine coeval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the Conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis, by the provisions of *magna charta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society: and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists, in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon the face of every commitment, the reason for which it is made: that the court, upon a *habeas corpus*, may examine into its validity; and according to the circumstances of the case discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I. the court of king's bench, relying on some arbitrary precedents, and those perhaps misunderstood, determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he had

been committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the Petition of Right,* 3 Car. I. c. 1, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms, including also the long vacation, to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding sureties for their good behaviour, which still protracted their imprisonment; the chief justice, Sir Nicholas Hyde, at the same time declaring, that "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter; whose resentment was not cooled at the distance of four and twenty years.

These pitiful evasions gave rise to the statute 16 Car. I. c. 10. § 8; whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet

* Ante, p. 99.

still in the case of Jenks, who in 1676 was committed by the king in council, for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law; the chief justice, as well as the chancellor, declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning, was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party: and many other vexatious shifts were practised, to detain state prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle, which either discovers the exercise of that power to be contrary to law, or, if legal, restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2, which is frequently considered as another *magna charta* of the kingdom; and by consequence and analogy has also, in subsequent times, reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to be the true standard of law and liberty.

The statute itself enacts, 1. That on complaint and request in writing by and on behalf of any person committed and charged with any crime,* (unless committed for treason or felony, expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact,

* This is now, as will shortly be seen, extended to other cases, by 55 Geo. III. c. 100.

to any [murder] or felony; or upon suspicion of such, plainly expressed in the warrant; or unless he have been convicted or charged in execution by legal process,) the lord chancellor or any of the twelve [now fifteen] judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall, unless the party has neglected for two terms to apply to any court for his enlargement, award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation, in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority, specified in the act, shall, for the first offence, forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he require it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be opened for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the

judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant, or oath that the same is refused, forfeit severally to the party grieved, the sum of 500*l*. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l*. to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire;* and shall be incapable of the king's pardon. This is the substance of this great and important statute, which it may be observed extends to the case of commitments for such criminal charges as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner: all other cases of unjust imprisonment, being left to the Habeas-Corpus at common law. But even on suits at the common law, it is now expected by the court, agreeably to ancient precedent, and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries;* otherwise an attachment will issue.

[As the statute 31 Car. II. c. 2, "extends only to cases of commitment, or detainer, for *criminal*, or supposed criminal matters," it was thought proper, in the year 1816, to extend its remedies to all other miscellaneous causes of confinement. Accordingly, by stat. 56 Geo. III. c. 100,

entitled "An Act for more effectually securing the liberty of the subject," it was enacted that when any person shall be confined or restrained of his or her liberty, (otherwise than for some criminal, or supposed criminal matter, and except persons imprisoned for debt, within England, Wales, Berwick-on-Tweed, or the isles of Jersey, Guernsey, or Man, any one of the judges in England or Ireland, may, in vacation time, award the writ, if upon affidavit, or affirmation (in cases where by law, an affirmation is allowed,) probable and reasonable ground for it shall appear. The writ is to be returnable immediately before the judge who awards it, or any other judge of the same court; or if issued so late in the vacation as to make it not conveniently returnable in the same vacation, it may be then made returnable in court, on a certain day in the next term. Although the return upon the face of it be good and sufficient, the truth of it may be questioned, and the facts examined, on affidavit or affirmation. The courts may award this writ also in term time, returnable if convenient in the next vacation before any judge of the respective court; and in all these cases disobedience to the writ may be punished as a contempt of court. A baron of the exchequer may, in vacation time, and in exercise of the common law power possessed by the court of queen's bench, issue the writ under the seal of the latter court, returnable in that court, in term time; and on affidavits entitled in the exchequer. The last section extends the provisions of this act as to the return of the writ, and the punishment for disobedience, to all writs issued under 31 Car. II. c. 2.]

By these admirable regulations, judicial as well as parliamentary, the remedy is now complete, for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always

* *Carus Wilson's* case 7 Q. B. 984. The writ runs to Jersey. Id. ib.

arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries, and has happened in England during temporary suspensions of the statute, that persons apprehended upon suspicion, have suffered a long imprisonment, merely because they were forgotten!

CHAPTER LII.

MERCANTILE LAW.

[THE Mercantile Law of England is, perhaps, justly observes one of our ablest writers on it, of all laws in the world, most completely the offspring of usage and convenience, and the least fettered by legislative regulations; an edifice erected by the merchant, with, at all events till recently, comparatively little assistance from courts of justice, or the legislature. The former have, in many instances, only impressed* with a judicial sanction, or deduced reasonable and proper consequences from, those regulations which the experience of the trader, whether borrowing from foreigners, or inventing himself, had already adopted as the most convenient. The legislature, wisely reflecting that commercial men are notoriously the best judges of their own interests, has interfered as little as possible with their avocations, and skackled trade and commerce with few of those formalities and restrictions which are mischievous, if only because of the waste of time incurred by complying with them.

[The fear of public opinion, and of the reproach and loss of credit following deviations from the regular course of business, and the dictates of truth and integrity, have combined to cherish that nice sense of commercial honour, so characteristic of the British merchant, and for which he is given credit by his brother merchants all over the world.

* *Vide, passim,* Smith's Merc. Law, Introd. 12, 13. 4th ed.

[When trade began to flourish in this country, those occupied about it, soon discovered that the law had provided but few rules for the guidance of their transactions; and that it was therefore necessary for them to adopt some regulations for their own government. Thus they in early times erected a sort of mercantile republic, the observance of whose code was ensured, less by the law of the land, than the motives which have been referred to. The law has now become, indeed, more copious, but the high spirit thus called forth, has ever since continued to pervade our mercantile community; conducing to a more scrupulous observance of punctuality and good faith, than could ever have been conferred by the most anxious efforts of the legislature. These and such are the reflections, adds the late learned and gifted author already referred to, "which suggest the inexpediency of compressing our commercial system into a code, by which the energy of the mercantile community, would be prevented from developing and improving the law without assistance from the legislature. Such a code would destroy the singular and fortunate plasticity of a system, the rules of which have been and always ought to be, made by the merchant, and dictated by his exigencies." * The disposition of modern legislation, however, is to move in this direction; as we have already seen,† in the Merchant Shipping Act, 1854, the existing Bankruptcy, and other acts.

[We have also seen ‡ that the rapid and gigantic growth of mercantile enterprise, and its novel requirements, have compelled the legislature recently to interfere with the mercantile law more frequently than has ever been known before: but there can be no doubt that such interference, so calculated to unsettle and change the mercantile world, and its vast interests and operations, ought to be limited by an absolute and pressing necessity. It is at this

* Smith's Merc. Law, Introd. p. 14. † Ante, p. 327.
‡ Ante, p. 395—8.

moment (1855) apparently the intention of Parliament to introduce a great alteration in the English law of Partnership, by allowing, as in France, America, and other countries, a responsibility on the part of those who may furnish the funds by which it is carried on, restricted to the amount of such funds; on the ground that it will bring dormant capital into active and useful employment. The propriety of such a change has occasioned great difference of opinion.

[The mercantile law is deducible, in great part, from the Imperial code of Rome, and the different maritime codes of ancient Europe. It is chiefly conversant with personal property: the laws regulating which are to be looked for in that of Rome. Our ancient jurists, devoted almost entirely to the explanation of the feudal system, and its consequences to the tenure of real property, rarely discuss the nature of personal property, which, as we have seen, was regarded as an altogether inferior and inconsiderable species of possession; but whenever they do so, they adopt, and almost *verbatim*, the doctrines and language of the civilians: and the more readily, as they find that already done by the ecclesiastical authorities, in administering such property after the death of its owner. Thus the Imperial law, so fiercely repelled from any interference with the landed interest, was adopted as the governing principle of a description of property destined ultimately to compete, at least, in importance with that landed interest.* This consideration affords another reason for the student of English law's paying attention to that of Rome.

[The reasons on which our law of real property is founded, are, generally speaking historical;† and part of history must therefore be recounted, in order to explain them fully and scientifically; while the mercantile law, as we have seen, is deduced from considerations of utility, the force of which the mind perceives as soon as they are pointed

* Ante, p. 445.

† Smith's Merc. Law, 4.

out. Great part of our law of real property, for instance, stands solely on feudal reasons; and to one ignorant of them, must appear a mere collection of arbitrary regulations. Our mercantile law on the contrary, though many of its rules are derived from the institutions of ancient times and distant countries, has incorporated those institutions, not from a blind respect for their origin, but an enlightened sense of their propriety. No one, unless acquainted with their feudal source,* could assign any reason for the rules respecting fines, escheats, or recoveries; but it is not necessary, for the purpose of comprehending the good sense and justice of the law of general average,† to know that it formed part of the maritime code of the ancient Rhodians.

[To three of the greatest judges that England ever saw, we are indebted for the systematic development of our commercial jurisprudence: Lord Holt, Lord Mansfield, and Lord Stowell: whose names are received with veneration by all competent to appreciate their exertions, both in this and in foreign countries. That jurisprudence is also cultivated and developed in the United States of America, to an extent which has earned for their judges and lawyers the highest respect in the mother country; and one of their most eminent ‡ thus concludes his valuable treatise on a great branch of this law.

[" On reviewing the whole subject, it cannot escape the observation of the diligent reader, how many of the general principles which regulate it, are common to the Roman law, to the law of continental Europe, and Scotland, and to the commercial jurisprudence of England. To the last, however, we are indebted, not only for the fullest and most

* Smith's Merc. Law, 2.

† By General Average is meant, the contribution of the several persons interested in a ship, freight, and cargo, to indemnify the owner of a particular portion against the damage, loss, or expense, occasioned to it, for the preservation of the rest, and the common good, when the whole adventure was in jeopardy.

‡ Mr. Justice Story, Commentaries on the Law of Agency, *ad finem.*

comprehensive exposition of these principles, but for the most varied and admirable adaptations of them to the daily business of human life. It is indeed to be numbered among the proudest achievements of England, that while the peculiar doctrines of her own common law, have been cultivated and illustrated by her lawyers, and administered by her judges, with a sagacity, learning, and ability rarely equalled, and never excelled, Westminster Hall has promulgated the more enlarged and liberal principles of her commercial jurisprudence, with a practical wisdom and enlightened policy, which have commanded the respect of the world, and silently obtained an authority and influence more enviable and more extensive, even than those acquired by her arts or her arms."

[An outline of the scope of the *Lex Mercatoria* cannot be better afforded, than by the fourfold distribution of the work several times cited in this chapter,—i.e. Mercantile Persons: Mercantile Property: Mercantile Contracts: Mercantile Remedies. Mercantile *persons* involve the description of those by whose intervention trade is carried on: i.e. sole traders, partners, joint-stock companies, corporations, principals and agents.—Mercantile *property* consists of shipping, good-will, negotiable instruments, together with the incidents peculiar to such property: *i.e.*, being transferrible by, and subject to, the operation of the bankrupt laws: that the right of survivorship (*jus accrescendi*) to real or personal property, does not exist among trading partners, for the encouragement of commerce: that goods delivered to a trader, to be carried, wrought or managed in the way of his trade, and trade fixtures, are for the time privileged from distress.—Mercantile *contracts*, are bills of exchange and promissory notes, contracts with carriers, contracts of affreightment, maritime, life, and fire insurance, bottomry, and respondentia, hiring and service; contracts with seamen, contracts of apprenticeship, guarantees, sales, debts.—Mercantile *remedies* consist of stoppage

in transitu, lien, bankruptcy. A faint idea may be gained, from this enumeration, of the extent, difficulty, and importance of this vast head of English law: concerning which the student may observe, generally, that that difficulty consists, not so much in the subtlety, or complexity of the rules regulating it, as in the application of them to endlessly varying combinations of circumstances. Those rules are acted on daily, and hourly, in the course of business, by those unconscious of the deep reasons on which they rest; but whose pecuniary interests, as involved in the justice and equity of such rules, would prompt them to have any one overturned, were it not demonstrably of that character.

[Many of these rules have long stood this test, and also that afforded by repeated examination in courts of law. Two recent important decisions afford instructive instances of mercantile opinion and usage, long acquiesced in, or at least not resisted, being suddenly and successfully challenged in a court of law. In one;* the question was, whether an agreement with a factor, selling on a *del credere* commission, need be in writing, as a promise "to answer for the debt, default, or miscarriage of *another person*," i.e. the buyer, within the statute of frauds.† It was held that it need not; for that the commission was really not for guaranteeing the buyer's performance of his contract, but only a higher reward paid by the principal to the factor, in consideration of his taking greater care in sales to his customers; precluding all question whether the loss arose from negligence or not;—and also for his assuming a greater share of responsibility than ordinary agents,—namely, responsibility for the solvency and performance of his contract, by the vendee.—The other case is one of far greater importance and interest, and over-rules a decision of Lord Ellenborough, acted upon ever since the year 1807, relating to an insurance

* *Couturier* v. *Hastie*, 8 Exch., 55, 56. † *Vide post*, p. 503.

on the life of William Pitt. It was held, in the year 1854, in a case relating to a policy effected on the life of the late Duke of Cambridge, that a policy of insurance on life, is *not* a contract of indemnity against loss, like a fire or marine policy, but simply what it is on the face of it, a contract to pay a definite sum, in consideration of an annuity paid during the life. The unsoundness of Lord Ellenborough's opinion to the contrary, was demonstrated by irresistible legal logic:* and it was stated by Baron Parke, in delivering the judgment of the Court of Error, that the decision in question of Lord Ellenborough,† had been uniformly disregarded in practice: the Insurance Offices not having felt it to their interest to avail themselves of that decision.]

* *Dalby* v. *The India and London Life Assurance Company* (in Err.) 24 Law J., N. S., C. P. 2; and see *Law* v. *The London Indisputable Life Policy Company*, 24 L. J., N. S. 196 (Chancery), 1855.

† *Godsall* v. *Boldero*, 9 East, 72.

CHAPTER LIII.



CONTRACTS.

[The word "contract," *contractus*, expresses, as its etymology shows, the idea of persons *drawn* not merely *towards* each other, but *together*, by some common motive; and signifies, in our law, an engagement, made in due form, upon a sufficient * consideration, between competent parties, for a lawful object. This definition, apparently as simple, as brief and comprehensive, contains the essential † elements of the thing signified; but involves conditions opening to the eye of the lawyer, as it were, a long vista of refined distinctions, for the exact adjustment of rights and liabilities, however keenly contested in all the relations and transactions of mankind, from the smallest to the greatest. The following questions arise, at first sight, out of this definition: What is the nature of the act called, an engagement? What is its due form? Who are competent parties to make the

* By "sufficient" is meant, sufficient in contemplation of law; and the word must not be confounded with "*adequate*," as to which, *vide post*, p. 508.

† The French law (*Code Civile*, art. 1101), defines a contract as, An agreement which binds one or more persons, towards another, or several others, to give, or do, or not to do, something; and by Art. 1108, declares four conditions essential to the validity of an agreement: the consent of the party who binds himself: his capacity to contract: a certain object, forming the matter of the contract: and a lawful *cause* (une cause licite dans l'obligation) or consideration.

engagement? What is a consideration?, What is a lawful object? A little closer consideration shows many dependent and collateral questions. Assuming, for instance, a valid contract or agreement, how is its existence to be evidenced? How and when is it to be performed? What is an excuse for performing it? How, when, and by whom may it be rescinded? Answers to these questions, which traverse three-fourths of the field of practical jurisprudence, and actual litigation, indicate every ground for sustaining or impeaching every description of contract; and cannot be properly given, but by skilful and experienced lawyers, nor understood but by thoughtful and earnest students. All that can be here done, is briefly to indicate a few general principles: premising that it is chiefly in relation to contracts that the Roman jurisprudence displays the profound and admirable sagacity of its architects.

To constitute a legally-enforceable contract, there must be, in the language of Lord Coke, *aggregatio mentium* [agreement],—a definitive absolute * accord between the parties, as to the terms of it: a request on one side, and an assent on the other: † a proposal or offer, and an acceptance in the precise terms of such proposal or offer: a promise on each side: a concurrence of intention. Anything short of this, in fact and law, fails to create a contract. ‡ However near the parties may have *approached* the point of contact, and anxious each to attain it, they have been *drawn* only *towards* each other, and not *together*; all is *in fieri*; and there is nothing of which the law can take cognisance on behalf of, or against, either party, by enforcing specific performance, or by awarding damages, compensating for non-performance.

* *Cheeveley* v. *Fuller*, 13 C. B. 122.

† Per Tindal, C. J., and Bosanquet, J., *Jackson* v. *Galloway*, 5 Bing. N. C. 75.

‡ Brokers' Bought and Sold Notes differing, afford an ordinary instance of such failure to effect an intended contract.

[And the assent above spoken of, includes both a physical, mental, and moral power of giving it, and the deliberate and free use of that power. A contract obtained by duress,—which consists of violent restraint, or imprisonment, and consequently applies to the *person* only, and not the goods,*—is avoided by proof of such duress.

[ii. A contract must be made in due form. Though no particular or technical words need be adopted, or are required by law, to give force to a contract, nevertheless the parties must express themselves with such distinctness, that it can be ascertained to a moral or reasonable degree of *certainty* what they mean. If their language be too vague or indefinite for their intention to be collected from it, there is no contract: for neither the court nor jury will make a contract for the parties.

[It is a general rule of the common law, that a simple contract,—by which is signified, as will be presently explained, one not by deed,—need not be in writing: and the properties of simple contracts are identical, whether those contracts be verbal or written. The statute law, however, wisely requires many agreements to be not only in writing, but often to be even by deed. The Statute of Frauds, for instance, as it is called, † passed in the year 1676, and entitled "An Act for Prevention of Frauds and Perjuries," requires a large class of agreements to be not only in writing, but the agreement, or some memorandum or note of it, to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

[The great Lord Nottingham used to say of this statute, "that every line was worth a subsidy:" but it has been well observed also, that every line has *cost* a subsidy, ‡ for no enactment of any legislature ever became the subject of so much litigation. Almost every word has been the

* *Oates* v. *Hudson*, 6 Exch. 348. † 29 Car. II. c. 3.
‡ Smith's Law of Cont. 32.

subject of anxious discussion, since its stringent provisions regulate matters of every day's occurrence, in our transactions with one another. Its object is simply, to prevent the facility to frauds, and the temptation to perjury, held out by the enforcement of obligations depending for their evidence on the unassisted memory of witnesses. This has become an object of infinitely greater importance than ever; since the legislature has opened the lips of the parties themselves, who have so deep an interest in upholding or defeating an alleged contract.—The two sections relating to contracts, are the fourth and seventeenth: each word clustering with cases that have heavily taxed the intellects of lawyers, and the purses of their clients. The fourth applies to five great classes of contracts: declaring, not that they shall be void if not in writing, and signed by the party or his agent, but that *no action* shall be brought to charge the contracting party by reason of it: differing materially in this respect from the seventeenth section, which is far stronger, and *avoids* the contract totally and absolutely.* The five classes of contracts under the fourth section are, *first*, promises by executors and administrators to answer damages out of their own estates; *secondly*, promises by any one to answer for the debt, default, or miscarriage of another person; *thirdly*, agreements made in *consideration* of marriage (not an agreement to marry); *fourthly*, contracts, or *sales*, *of lands*, tenements, hereditaments, or any interest in or concerning them; *fifthly*, agreements not to be performed within a year.

[The seventeenth section applies to the sale of goods; and, as amended by a subsequent statute (9 Geo. IV. c. 14, § 7), enacts, that *no contract* for the sale of any goods, wares or merchandise for the price of 10*l*. sterling or upwards, (notwithstanding the goods may not be actually made, procured, or provided, or fit or ready for delivery, or some act

* Per Bosanquet, J., *Laythoarp* v. *Bryant*, 2 Bing. N. C. 747.

may be requisite for that purpose, or may be intended to be delivered at some future time) *shall be good*, unless some note, or memorandum in writing, of the bargain be made, signed by the parties to be charged by it, or their lawfully authorised agent, except in three cases: when there has been an acceptance of any part of the goods; payment of part of the price; or something given by way of earnest, to bind the bargain.

[The last-mentioned statute, 9 Geo. IV. c. 14, §§ 1, 5, 6, renders a signed writing necessary, also, in three other cases of much importance: an acknowledgment or promise to take a case out of the operation of the Statute of Limitations; a promise made after full age, to pay a debt contracted, or ratification of a promise or simple contract made, during infancy; and a representation or assurance made, or given, relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent that he may obtain credit, money, or goods [on it].

[All these are cases of simple contracts, in which, where the signature is by an agent, it is not necessary that he should have been appointed in writing. There are, however, certain other cases, in which he must have been so appointed, for the purpose of actually creating or transferring a title to land, by lease for a period exceeding three years, or otherwise; and such creation or transfer must now, also, be by deed.*

[When an agreement is thus reduced into writing, (and it may be collected out of a long series of letters, one only, where it is necessary, being stamped) the construction of it is for the court, or a judge, not a jury; and as in the case of statutes,† the great rule is, to collect the intention of the parties from the language which they have used, on a careful consideration of the whole of that language. The construction must be reasonable; liberal—according to the

* Stat. 8 & 9 Vict. c. 106, § 3.

† Ante, pp. 64, 65.

most comprehensive popular sense, unless there be anything in the agreement showing that such was not intended; favourable—so as to support the agreement as far as practicable. It is a rule established for the purpose of defeating studied ambiguity and deceitful intricacy of expression, that the words of a grantor of anything, or of a contractor,* shall be taken most strongly against *himself*. *Verba cartarum fortius accipiuntur contra proferentem*. This rule, however, is one of such rigour, that it must be the last resorted to, only when all others have failed.

[An agreement, moreover, must speak for itself, and oral evidence is not admissible to contradict or alter it. No contemporaneous verbal expressions can be engrafted on the agreement, for the purpose of altering, adding to, or taking away from its import: and this, from grounds of obvious propriety, reason, and justice; but the rule is subject to important limitations; and the application of it is often a matter of extreme difficulty. There are two kinds of ambiguity in written instruments, one of which is, and the other is not, explainable by verbal evidence. If the ambiguity be one appearing on the face of the instrument, it is called a *patent* (*patens*) ambiguity: and oral evidence is inadmissible: as in the case of a will, if there be a blank left for the legatee's name. If, however, the instrument be on the face of it intelligible, but a difficulty arises as to the identity of the subject to which it applies—as, if a bequest were to "John Smith," without further description;—this would be called a *latent* (*latens*) ambiguity, lying *hidden* till evidence had been adduced, showing, for instance, that there were a great number of persons corresponding with the name used in the will.†

[It is often sought to engraft *usage* on express written

* See *Rhodes* v. *Ibbetson*, 23 Law J., N. S. (Chancery) 459 (1853); where the ambiguous words of a seller, were construed most favourably for the purchaser.

† Smith's (J. W.) Law of Contracts, pp. 28, 29.

terms: but, in the terse language of Lord Lyndhurst,* usage may be admissible to *explain* what is doubtful, but never to contradict what is plain. And again, in the language of another great authority,† it is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly, or impliedly, exclude them. Thus far for the necessity of contracts being made in due form; and when in writing, of the rules for construing them.

[iii. "A bargain," said Lord Loughborough,‡ "without a consideration, is a contradiction in terms, and cannot exist." This is the "cause," the very foundation of a *simple* contract, equally at law and in equity. In its absence, a promise or undertaking is purely gratuitous, and, however sacred, and binding in honour, creates no legal obligation. This was the rule also of the Roman law; which called such a *nudum pactum*—a mere naked promise, *ex quo non oritur actio.* This is one of the most important laws in our whole system; and the reason why it is enforced with great strictness is, to guard persons against the consequences of their own improvidence, in entering hastily and improvidently into engagements which may prove ruinous. The enforcement of such promises, at law, however plausibly recommended by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings, to claims for just debts; reversing the rule, Be just before you be generous. Suits would thereby be multiplied, and voluntary undertakings would be also multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a

* *Blackett* v. *R. E. Ins. Co.*, 2 Tyrr. 266.
† Parke, B., *Metzner* v. *Bolton*, 9 Exch. 521.
‡ *Middleton* v. *Lord Kenyon*, 2 Ves. J. 188.

doctrine, and the faithful discharge of their duty rendered more difficult.* On these principles it is held that a mere *moral obligation*, however sacred, does not constitute a consideration for a binding promise, except in those cases in which there has once been a legal right, which has become devoid of legal remedy: as in the case of a debt barred by the Statute of Limitations, but revived by a subsequent promise. A recent case affords a remarkable illustration of this doctrine.†—What, then, *is* a legal consideration? The best and most practical answer is, *any* benefit to the person who makes the promise; or, at his request, to any third person; or *any* loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.‡ Any one of these is a sufficient *cause* of the contract. Though the consideration must be of *some* value, in contemplation of law, courts of law cannot enter into the quantum, or amount of it,§ in order to see whether it be, in their opinion, *adequate* in value to the thing promised for it. This would be to exercise a sort of tyranny over the parties, who, in their various transactions, have a right to fix their own value on their own labour and exertions, but would be prevented, if subject to a subsequent legal scrutiny, whether the bargain had been such as a prudent man would have entered into. Very gross inadequacy, however,—*e.g.* the taking of ten pounds for an estate worth ten thousand,—might afford evidence of the existence of *fraud*, which, as we have seen, will vitiate every thing.||

[iv. A contract must be between parties capable of contracting; the law protecting those who cannot protect themselves. It presumes, however, a full capacity to con-

* *Per Cur. Eastwood* v. *Kenyon*, 11 A. & E. 451; and see Smith's Law of Contracts, p. 86.

† *Beaumont* v. *Reeve*, 8 Q. B. 483.

‡ Smith's Law of Cont., p. 87.

§ Parke, B., *Smith* v. *Monteith*, 13 M. & W. 442.

|| Ante, p. 461.

tract; and the *Code Civile* declares (art. 1123) that "every person may contract, who has not been declared by the law incapable of doing so." Our law has declared some persons absolutely incompetent to contract.

[If at the time of entering into the supposed contract, a man be in such a state of drunkenness that he is not aware of what he is doing, and this is known to the opposite party, the latter is guilty of actual fraud, and the contract is void altogether. The signature of such a drunkard is as if it had been made in a state of somnambulism.* So also, in the case of an insane person, there can evidently be no capacity of contracting, while in that condition: and if the other party have notice of the insanity, from opportunities of observation afforded by the insane person's conduct, both before and after entering into the contract, and of which evidence is admissible for that purpose, the contract is void.† In this case also, as in that of total drunkenness, the other contracting party is guilty of fraud. It has, however, been recently decided, after great consideration, by a Court of Error, that unsoundness of mind will not vacate a contract, where the other party is ignorant of the fact of such unsoundness, and no advantage is taken by him of the lunatic, but the transaction is in the ordinary course of human affairs, fair, and *bonâ fide*: especially where the contract having been wholly or partially carried into effect, the parties cannot be restored to their original position.‡ The old and absurd doctrine of our law, that a man should not be heard to stultify himself, against which Blackstone reasoned powerfully,§ is now completely overturned; and in the case above cited, it is formally decided that it is open to a man, or to his representatives, to shew

* Per Alderson, B., *Gore* v. *Gibson*, 13 M. & W. 626, 7.

† *Beavan* v. *McDonnell* (1854), 23 Law J., N. S., Exch. 326.

‡ *Molton* v. *Camroux*, 4 Exchq. 17. This rule was adopted implicitly in the recent case of *Beavan* v. *McDonnell*, 23 Law J., N S. Exch. 94.

§ 2 Comm. 291.

that he was so lunatic, or drunk, as not to know what he was about.

[We have already seen, generally, to what extent an infant is capable of entering into a contract;* and also the position, in contemplation of law, of a married woman.†

[v. A contract must have, moreover, a lawful object, or purpose; that is, it must be to do an act which is not forbidden by either the statute or common law; or to abstain from doing some act not enjoined by statute or common law. A contract is illegal at common law on one of three grounds:— as violating morality: opposed to public policy; or tainted with fraud. As to contracts illegal because in contravention of the statute law, it is necessary to say only that no contract is valid, which is forbidden expressly, or by implication, by a statute: in which case no court will lend its assistance to give it effect. And it must be observed, that a penalty implies a prohibition.

[vi. As to the evidence of a contract—There is no distinction between an *express* and an *implied* one, except as to the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract, by circumstances—as, by the general course of dealing between the parties: but, whenever a contract has been once *proved*, the consequence resulting from the breach of it, must be the same, whether it have been proved by direct or circumstantial evidence.‡ And when acts of parliament prescribe certain formalities to be observed,—as writing and signing,—they are not part of the contract itself, but only necessary evidence of it; the intrinsic character and effect of it being left untouched.

[The contracts of which we have spoken thus at large, on account of their extensive interest and importance, are called *simple* contracts, to indicate the contradistinction to

* Ante, p. 352. † Ante, pp. 335—8.

‡ Per Lord Tenterden, *Marzetti* v. *Williams*, 1 B. & Ad. 423.

specialty contracts; by which are signified contracts under seal, or by *deed*. A deed is a written instrument *sealed, and delivered*: both of which are absolutely essential. There are certain peculiar characteristics of this class of contracts: the chief of which is, that a contract by deed is conclusively *presumed*, by the law, to have been made upon a good and sufficient consideration; which must be *proved*, in the case of a simple contract, if denied, with the exception of bills of exchange and promissory notes. These instruments are always *primâ facie* presumed to have been given for a sufficient consideration: but this presumption may be rebutted, either wholly, or partially, by evidence to the contrary. When to a simple contract are added the formality and solemnity of sealing and delivery, these ceremonies import deliberation, and attach an importance, and a character, not belonging to a contract entered into by mere writing, or word of mouth.

[By the law of England, all contracts are distinguished into these two kinds,—those by specialty, and those by parol: *i.e.*, verbal, or in writing merely, with one exception, and that of a kind little used in the ordinary affairs of private individuals. What is here alluded to, is a Recognisance; an instrument by which a witness is compelled to appear and give evidence in a criminal case: in which he *acknowledges* himself to be bound in a certain sum, to the Queen, to perform the duty cast on him; and on failure, he is said to have forfeited his recognisance, and the sum in which he is bound, is payable to Her Majesty.

[The mode in which a contract must be performed, depends primarily on that prescribed by the contract, whether expressly, or impliedly; and on certain rules of law devised to secure the equitable performance of all contracts.—The person who is to be discharged from liability, upon a contract, by the performance of a certain act, is impliedly bound to do, or cause to be done, the act which is to exonerate him. It is a debtor's duty, for instance, to

seek out his creditor, and tender payment, at the proper time,—that is, generally speaking, before any demand be made, or action brought,—in the proper mode, and to the proper amount; and the creditor's duty to receive that payment, and make his debtor a proper acquittance. A contract is also to be performed according to its legal construction; and, when no time is fixed, within a reasonable time.* It is impossible here to do more, than apprise the student, that the rules regulating the time and manner of performing a contract are very numerous, and often nice and difficult of application, especially when acts are to be done by both parties, and one as the condition of doing the other.

[If a person choose foolishly to contract to do an act absolutely,—that is, without expressly providing against contingencies, and exempting himself from liability in certain events,—an inevitable accident, or an unforeseen contingency, will not excuse performance; and he must answer in damages if he refuse. The law, however, does not seek to compel a man to do that which he cannot possibly perform: for, in the language of Lord Stowell, the law itself, and the administration of it, must yield to that to which every thing else must bend. *Lex non cogit ad impossibilia, vana, seu inutilia.* These principles, however, are subject to many exceptions and limitations. A great maxim, is *Actus Dei nemini facit injuriam:* i.e. the act of God is so treated by the law, as to affect no one injuriously, in cases where the law had cast on a party a duty to be performed, which, by the *actus Dei*, alone, is prevented: as by storms, tempest, or lightning. It would be unreasonable, says Lord Coke, that those things which are inevitable by the Act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person, in whom

* A contract to be performed "directly," does not mean "within a reasonable time," but "speedily"—or at least, "as soon as practicable." *Duncan* v. *Topham*, 8 C. B. 225.

there was no laches, which last is a very material consideration.*

[Finally, it is both a legal and moral duty, incumbent on all parties to a contract, having entered into it with due consideration of the consequences, to perform that contract conscientiously and punctually, and as near to the letter and spirit of it, as possible.

[It is proper here briefly to apprise the reader, of a very important alteration effected, in the year 1856, by Statute 19 & 20 Vict., c. 97, entitled 'An Act to Amend the Laws of England and Ireland affecting Trade and Commerce,'—with respect to the law affecting guarantees. With reference to a clause in the fourth section of the Statute of Frauds (*ante* p. 504), it is now enacted (§ 3), that 'no special promise' in writing, and signed, 'to answer for the debt, default, or miscarriage of another person,' 'shall be invalid, by reason only that *the consideration* for such promise does not appear in writing, or by necessary inference from a written document.' The object of this enactment is, to put an end to many vexatious difficulties and subtleties, arising out of a long-established judicial construction of the fourth section of the Statute of Frauds. The new Act also provides (§ 4), 'that no guarantee to, or for a Firm, shall be binding on the guarantor, after a change of the Firm, unless a contrary intention shall appear, by either express stipulation, or by necessary implication from the nature of the firm, *or otherwise*.' The Act effects other changes of great practical importance, and ought to be consulted carefully by the reader.—It was attempted, during the same Session, even wholly to repeal the 17th section of the Statute of Frauds, *ante*, pp. 504-5.]

* *Shelley's Case*, 1 Coke Rep. 97. See the judgment of Lord Stowell in *The Generous*, 2 Dodson, 323-4: and Broom's Maxims, 171—189, where the subject is lucidly explained.

CHAPTER LIV.

THE SUPERIOR COURTS OF COMMON LAW.—INFERIOR COURTS.

[By the expression "*the Superior Courts of the Common Law*," which the legislature has sanctioned in several recent statutes, are signified the three courts of the Queen's Bench, Common Pleas, and Exchequer, which sit at Westminster.* They are called "superior," in contradistinction to "inferior" courts; which, among other incidents, have only a limited and local jurisdiction, cannot grant a new trial on the merits, and are liable to have their proceedings, subject to certain restrictions, removed into, and reviewed by, the superior courts.

[How, and when, these three courts became stationary at Westminster, and how two of them originally acquired jurisdiction,—to a great extent by flimsy fictions,† covering

* The Counties Palatine of Lancaster and Durham, are also original Superior Courts (*Peacock* v. *Bell & Kendal*, 1 Saund. Rep. 73), and are called "Superior Courts" in the title to the Common Law Procedure Act, 1852, and "Superior Courts of Common Law" in that of 1854.

† The Court of Queen's Bench acquired a jurisdiction in ordinary suits, at the expense of the Common Pleas, by means of a pure false pretence. A man was *alleged* to have committed a breach of the peace, within the extraordinary criminal jurisdiction of the court, for which he was *supposed* to have been committed to the custody of the Marshal! and then, having been got within its jurisdiction, could be proceeded against in any civil action! The Court of Exchequer acted similarly. A plaintiff was allowed

mere encroachment and usurpation on the province of the third,—is now a matter of only antiquarian interest: and those so inclined may gratify their curiosity, by referring to the interesting and lucid account of these matters, to be found in the Commentaries.* All we are here concerned with, is their existing condition; the nature and extent of their jurisdiction, and how it is exercised: premising, that changes unprecedentedly great have been lately effected in the administration of the common law, in order to adapt it to the requirements of the age, by promoting the expeditious, economical, and efficient administration of justice, in the superior courts, to all the Queen's subjects disposed, or bound, to resort to them. Each of these courts still exercises certain important exclusive jurisdiction; but over actions at law, with certain exceptions, they have a concurrent jurisdiction, and co-ordinate authority. Each is bound to respect the other's decision, while it stands unreversed on error, by the Court of Exchequer Chamber, or House of Lords, on appeal. Thus, Mr. Baron Parke, on a recent occasion, while expressing the deliberate dissatisfaction of the Court of Exchequer with a decision of the Court of Queen's Bench, declared that they were nevertheless bound by it, "as they were only a court of co-ordinate jurisdiction."† And subsequently Lord Truro, when Chief Justice of the Common Pleas, held the same language in speaking of the Court of Exchequer,‡ that "that court

to pretend himself to be a debtor to the crown! and that by reason of the defendant's having done him the injury or damage complained of, the plaintiff was the less able to pay his own debt or rent to the crown!—By no better tenure did these courts hold a very large share of their jurisdiction, down to the year 1832; when the first of a long series of statutes for reforming the administration of the common law (stat. 2 Will. IV. c. 39), abolished the existing complicated process, founded on these gross fictions, and invested each of the three courts with a direct and proper jurisdiction.

* Vol. III. pp. 37—60.

† *Wagstaffe* v. *Sharpe*, 3 M. and W. 525.

‡ *Barker* v. *Stead*, 3 C. B. 951.

having solemnly decided a point, it did not become a court of co-ordinate jurisdiction to entertain a discussion as to the propriety of such a decision: that should be left to a court of error; a contrary course leading to much uncertainty and inconvenience to the public."

[Subject to recent great inroads, as will shortly be seen, the three Superior Courts of Common Law have jurisdiction in all personal actions whatever, to any amount: and so strongly inherent is such jurisdiction, that in the language of Lord Mansfield,* 'nothing but *express negative* words in a statute shall take it away.' In the year 1856, by statute 19 & 20 Vict. c. 108, that of the County Courts was, on the one hand, extended considerably beyond the point to which it had previously reached, and on the other, slightly restricted. Two actions—those for Criminal Conversation, and on Judgments in the Superior Courts—are peremptorily withheld from the County Courts (§§ 23, 27); but with respect to "all other actions which may be brought in any of the Superior Courts," if both parties agree in writing that it shall be so, the County Court will have jurisdiction (§ 23): and if, in like manner, they agree, the judge's decision will be final (§ 69).—If in an action brought before him, the *title* to any incorporeal hereditament, toll, fair, market, or franchise come incidentally in question, he may, if the parties, at the hearing, consent in writing, decide the claim which it is the immediate object of the action to enforce; but his judgment will be *no evidence of such title*, in any court (§ 25).—Where a debt or demand consists, after an admitted set-off, of a balance not exceeding 50*l*. it may be recovered in a County Court (§ 24); and if such an amount, whether reduced to it by admitted set-off, payment, payment into court, or otherwise, be sued for in a Superior Court, a judge may, *after issue joined*, at the instance of either party, order the action to be tried in any County Court (§ 26).—If an action of contract be brought in a Superior

* *R.* v. *Abbott*, 2 Doug. 555, *note*.

Court for a sum not exceeding 20*l.*, and the defendant suffer judgment by default, no costs are recoverable, unless specially allowed by a judge (§ 30); and if an action be brought in a County Court, for a debt, or liquidated sum, exceeding 20*l.* the plaintiff may require of the defendant a notice of his intention to defend, on pain of judgment by default (§ 28).—A landlord may recover summary possession of premises of which neither the value of the premises nor the rent shall have exceeded 50*l.* by the year, on the expiration of the term, or of notice by either party to quit, or if half a year's rent be in arrear, and he have a right of re-entry (§§ 50—52). In actions of tort, or contract, though on a small scale, brought in the County Court, the defendant may, on giving sufficient security, obtain leave to have the action removed into, and tried in, a Superior Court (§§ 38, 39). Finally, it is to be observed, that the pressure on plaintiffs to resort to these inferior tribunals, does not consist in positive prohibition, but in withholding their costs, even though successful. The precise limits within which such pressure operates, must be sought in the statute above cited, and those which it incorporates. To particularise them, is beyond the scope of this work. The Act, of which some leading provisions have been given, exhibits the anxiety of the Legislature to support the County Courts; to remove occasions of conflict between them and other inferior courts; and facilitate the access of suitors to tribunals of cheap and speedy action, without depriving them, under due restriction, of the right of having such decisions revised by the Superior Courts.

[There are certain other inferior civil courts of record, created by charter or act of parliament, in various parts of the country, which have a jurisdiction to try all kinds of action, and to any amount, subject only to the limitation of locality, and the right of removal, as a matter of course, into the superior courts, by writ of *certiorari;* a right which also exists, in certain cases, in respect of actions commenced in the new county courts.

[Thus far for the jurisdiction, over actions, of the three Superior Courts of common law, either exercised exclusively, or shared with inferior courts. The mode of stating that jurisdiction has been adopted, for the purpose of at once disclosing the vast inroad upon it made by the legislature, in the years 1846, 1850, and 1856, in its anxiety to provide for "the more easy recovery of *small* debts and demands." It has been, however, during the same interval, at least as solicitous to provide for the more easy recovery of the *great* debts and demands, which form proper subjects for the jurisdiction of the superior courts. It is utterly in vain to attempt to afford the student, or lay reader, an adequate idea, in these pages, of the immense changes which have been wrought in this quarter, within even the last four years. It is almost as though an old house had been pulled down, and rebuilt in a different fashion, though with many of the old materials, in accordance with modern taste and requirements. All that can be here attempted, is to afford a glimpse of some of the leading features of these alterations and improvements.—Plaintiffs and defendants can now come, disembarrassed of foolish fictions and needless technicalities, to an understanding, as it were, at the very outset, concerning the real matter in dispute between them: each armed with ample powers of scrutinising the other's pretensions, and ascertaining his movements and objects, at every step, from the first to the latest stage in the litigation. The court, or a judge, is constantly at hand to deal equitably between them, for the purpose of removing out of the way obstacles and grounds of delay; affording to each, by interrogation upon oath, those powers of discovery which have, hitherto, been obtained through a court of equity only; and inspection of any property, real or personal, by the jury, the party, or his witnesses, as far as may be material to the proper determination of the question in dispute.—Also documents in the custody or control of his

opponent, relating to the action, or pending proceeding, may be inspected by either litigant party; and even copies of them taken, subject only to the proper limitation on such a right, long prescribed by courts of equity.—If a cause appear unsuitable—as consisting wholly, or in part of matters of mere *account*—for trial by jury, the court, or a judge, on the application of either party, may, before trial, either decide it summarily, or order it to be referred wholly, or partially, to an arbitrator agreed upon by the parties, or to an officer of the court, or, in country cases, to a judge of a county court.—If the cause go on to trial, and there then appear to the judge matters of account to be involved, not conveniently triable before him by a jury, he may order them to be referred to an arbitrator; and this, independently of the consent or non-consent of the parties, by the authority of the judge alone; who may proceed to dispose in the ordinary way, of any remaining matters in issue.

[Again. Many equitable powers, in furtherance of legal remedies, hitherto exercisable by a court of equity only, are now vested in the common law court, or judge: and in particular, a defendant may avail himself, in a court of law, of an equitable defence to an action; while the plaintiff, in his turn, may answer his opponent's plea by a replication of equitable matter; but these topics, will be more fully and fitly explained in the ensuing chapter, for reasons which will be there assigned. It may however be here suggested, that these more recent changes are of a fundamental character and may be attended, as has been already intimated,* with consequences of the utmost practical importance to our system of jurisprudence.

[The parties to an action have also new and great facilities afforded them, for testing the correctness of a ruling against them, by the court, during the progress of

* Ante, p. 68.

the action, by direct appeal to the Court of Exchequer Chamber, and thence to the House of Lords; while corresponding facilities are afforded to both parties, for bringing before the courts, in a summary way, matter important to their cases. A judge, with the consent of the parties, may try a cause, and pronounce a verdict, without the aid of a jury; a judgment creditor may now avail himself of *debts* which are owing to his judgment debtor; and a third person may be compelled by a judge, at the instance of either party, to attend and be examined, if he had before refused to make an affidavit.

[Again, all the three courts, and all their judges individually, sitting in banco, or at Nisi Prius, are armed with greatly augmented powers of amending all defects and errors in any proceeding, in civil cases, on equitable terms: and in short, of making "all such amendments as may be necessary for the purpose of determining, in the existing suit, *the real question* in controversy between the parties;" what that real question is, being left, at the trial, as a matter of fact, to be determined by the judge, from the pleadings and evidence.* The system of Pleading, moreover, has been reduced from its prurient and mischievous luxuriance, and now exhibits a degree of simplicity and directness † which may commend itself to the common sense of any intelligent layman; but after all, is little more than a return to the ancient system in the time of Edward I.; when, as the commentator correctly states, "pleadings were short, nervous, and perspicuous; not intricate, verbose, and formal:" ‡ while corresponding alterations have been effected in the law of Evidence, as will be shown in a subsequent

* *Wilkin* v. *Reed*, 23 L. J. N. S., C. P. 193.

† Those venerable legal puppets, *John Doe* and *Richard Roe*, with their quaint antics, have disappeared for ever. There is now neither declaration nor plea in the action of ejectment; only a statement of the names of the parties, and of the property sought to be recovered; the sole question being one of title.

‡ 4 Comm. 427.

chapter; and the judges, under legislative authority, have established an entirely new code of Practice.

[The above are such few of the recent sweeping changes in the administration of the Common Law, as may serve to show the spirit in which they have been conceived; their extent being incidentally and sharply evidenced to the practitioner, by the havoc which they have made in his library!—The chief engines for effecting these reforms, are the two Common Law Procedure Acts for 1852 and 1854. It may be regretted that they were not consolidated in the first instance, as they may ere long be, into one statute.

[A suitor may, subject to the limited restriction to be presently specified, select which of the three courts he pleases: the method of procedure in each, being identical. Each court consists of a chief, and four puisne judges, or barons; and all the courts may appoint and hold sittings either in banco, or for the trial, by judge or jury, of issues in fact, and at any time, in term, or vacation, except between the 10th of August and the 24th of October, which are the limits of the long vacation.

[The litigants may conduct their own cases personally, or with the aid of counsel, and attorneys; and all the three courts are open to all classes of practitioners alike—queen's counsel, sergeants, barristers-at-law, and attorneys.

[Error lies from the judgment of any one of the three courts, directly to the Exchequer Chamber before the members of the other two courts, and thence to the House of Lords: but the *writ* of error is abolished, and the procedure in error greatly simplified.

[Thus far we have spoken of the jurisdiction, over *actions*, exercised concurrently by all the three Superior Courts: but each has, besides, matters within its own province, exclusively.

[i. The court of QUEEN'S BENCH * is the Supreme court

* In the reign of a king, it is called "The King's Bench." In the time of the Commonwealth, it was styled "The Upper Bench."

of common law in the kingdom, and exercises a high and transcendent authority: keeping all inferior jurisdictions within their due bounds, and removing their proceedings where it may be deemed necessary, to be determined by itself, or prohibiting their progress below. It is also the superior Criminal Court of the land, to which Grand Juries have been regularly summoned from time immemorial, and which the Court has no power to discontinue. Indictments for high treason have been preferred to them, and may again, should there ever unhappily be occasion.* This high court also superintends all civil corporations; commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy; protects the liberty of the subject by speedy and summary interposition; taking cognisance of both criminal cases, on its crown, and civil, on its plea side. It is also the Court of Error from the courts of Common Pleas at Lancaster, and of Pleas at Durham, and from inferior courts of record.

[ii. The Court of COMMON PLEAS, next in rank to that of the Queen's Bench, has exclusive jurisdiction in the few Real actions which remain in existence, relating to Dower, and also, in certain matters recently confided to its exclusive jurisdiction. First, by statute 6 Vict. c. 18, § 42, this court is constituted the exclusive and final court of appeal from any decision, by a revising barrister, concerning the right to vote in the election of a member of parliament, "on any point of law material to the result of the case:" and the decisions of the court are conclusive, and binding on every committee appointed by the House of Commons, for the trial of any election petition. Secondly, by statute 17 & 18 Vict. c. 31, (the Railway and Canal Traffic Act, 1854,) this court has been selected for

* Per Lord Campbell, L. C. J., addressing the grand jury in Easter Term, 7th of May, 1855, on their complaining of being summoned every Term apparently for no purpose.

the responsible duty of administering equal laws for regulating the relation between the public, and the great railway corporations. The avowed object of this statute is, to protect the public from any evil consequences which may result from the grant the legislature has made to the railway companies, of a virtual monopoly of the traffic over these great public highways.* The necessity of such a rigorous control and supervision as this act establishes, over the traffic on our railways, has long been apparent, and the construction and enforcement of the comprehensive enactment for this purpose, contained in the second section of the act, the legislature has intrusted to the court of Common Pleas, and armed it with great powers (§ 3,) for accomplishing that object with advantage to the public.

[iii. The Court of EXCHEQUER is now a court of Revenue, as well as of common law: but was also, down to the year 1841, a court of equity. In that year, however, by statute 5 Vict. c. 5, its equity jurisdiction (except as a court of revenue †) was abolished, and transferred to the court of Chancery. As a court of revenue, it ascertains and enforces, by appropriate proceedings, the proprietary rights of the crown against its subjects, ‡ which are matters so purely cognisable in this court, § that if an action in which they come in question, be brought in another court, the court of Exchequer, on the mere suggestion of the attorney-general, and without any affidavit, will remove the cause into its own court, from the other, but placing the parties in the same stage of the proceedings which had been reached in the other court. ||

[For the trial of actions commenced in the superior courts, the judges sit at NISI PRIUS, as it is still called, during both term time and vacation, in Middlesex and

* See Hodges on the Law of Railways, p. 564 (2nd Ed.).

† *Ex parte Halling*, 15 M. & W. 687.

‡ 3 Steph. Com. 391.

§ Per Parke, B., *Adams* v. *Freemantle*, 2 Exch. 455.

|| Id. p. 453. *Attorney-General* v. Hallett, 15 M. & W. 97.

London, and twice annually in all the other counties in England and Wales; into which they go, for that purpose, and also to deliver the gaols, by trying prisoners, on the spring and summer circuits, in the respective vacations of Hilary and Trinity terms.* These circuits are eight in number: the Home, Midland, Norfolk, Oxford, Northern, Western, North Wales, and the South Wales. While thus engaged, the judges are commonly called judges of "*Assize* and *Nisi Prius*," terms now, however, used, in conformity with a state of the law which has ceased, through the effect of the statutes abolishing real actions, and also the Common Law Procedure Act, 1852 (§ 104). The judges sit by virtue of several authorities: that of Nisi Prius for the civil business; the commission of the peace; Oyer and Terminer,—for *enquiring* by means of the grand jury, and *trying* by the petty jury, all offences for which bills are presented at the assizes for the time being; and General Gaol Delivery,—for trying and delivering every prisoner who may be in gaol when the judges arrive at the assize town, whether the indictment may or may not have been preferred at any previous assize. Under this authority they must clear and deliver the gaol of all in it, whenever and for whatever crime indicted. There are included in the Commission for the dispatch of civil and criminal business, the queen's counsel, sergeants, and barristers having patents of precedence, practising on the circuit; each of whom can, if required, act as judge of assize † while the commission is in force. While fourteen of the judges are thus absent on their circuits, the fifteenth remains in town, attending at chambers, for the dispatch of all matters requiring the exercise of his authority.

[If the ruling of a judge on circuit, in a civil case, be objected to by either of the parties, or if the verdict be from

* For the latter purpose a Winter Assize has latterly been held in the counties of York and Lancaster.

† 13 & 14 Vict. c. 25.

any cause deemed unsatisfactory, the matter is discussed before the court at Westminster in which the action is pending, on a motion made, for that purpose, within the first four days of the ensuing term. This is done according to the nature of the case, either with, or without the leave of the judge, at the trial. And here may be cited the just eulogy pronounced by Blackstone upon this admirable institution. "The trial, if held in the country," he says, "is to be before the judges of assize, delegated from the courts at Westminster: persons whose learning and dignity secure their jurisdiction from contempt. The very point of their being strangers in the county, is of infinite service in preventing those factions and parties, which would intrude in every cause of moment, were it tried only before persons resident on the spot. And as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule, and the administration of the laws, uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments are blended together, as they are interchangeably courts of appeal, or advice to each other. Hence their administration of justice, and conduct of trials, are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment.*—Thus, if facts are disputed, they are sent down to be tried in the country, by the neighbours; but the law arising from these facts, is determined by the judges above: and if *they* are mistaken in law, there remain successive courts of appeal to rectify their mistakes—the exchequer chamber, and the house of lords." †

* 3 Bla. Com. 356. † 3 Bla. Com. 59.

[How long this ambulatory administration of justice may, however, continue one of our institutions, it is not easy to say, in this time of change; but the following observation of a distinguished historian of our Constitution,* is worthy of being well weighed by the legislature. "To this excellent institution we have owed the uniformity of our common law, which would otherwise have been split, like that of France, into a multitude of local customs; and we still owe to it the assurance, which is felt by the poorest and most remote inhabitant of England, that his right is weighed by the same incorrupt and acute understanding, upon which the decision of the highest questions is reposed."

[In London and Middlesex, every judge of the superior courts is authorised to sit there, for the trial of issues arising in *any* of these courts; and, by the Common Law Procedure Act 1854, at the request of either chief justice, or of the chief baron, any of the judges may sit for the trial of causes there, on the same day on which the former, or any other judge of the same court, may be sitting; so that the trial of two causes, in the same court, may be proceeded with simultaneously.

[In concluding this brief account of the administration of justice by the great common law courts of the country, it may be instructive to fix the attention of the student, upon the grand distinction between LAW and FACT; with reference to the provinces of judge and jury.—It is an ancient and cardinal maxim, *de Facto respondent Juratores, de Jure Judices;* and to this is to be attributed the distinctive character of our jurisprudence. It is of essential importance to bear in mind this distinction; which cannot be better expressed than in the language of that eminent common lawyer, Lord Tenterden.

["I consider the system of special pleading, which prevails in the law of England, to be founded upon,

* Mr. Hallam. 2 Middle Ages, p. 463 (5th Ed.)

and adapted to, the peculiar mode of trial established in this country, — the trial by jury: and that its object is, to bring the case, before trial, to a simple, and, as far as practicable, single question of fact: whereby, not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors, may be rendered as small as possible. And experience has abundantly proved that both these objects are better attained, where the issues and matters of fact to be tried, are narrowed and brought to a point, by the previous proceedings and pleadings on the record, than where the matter is left at large, to be established by proof, by either the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him."* This was said in the year 1832; and may be read instructively by the light of the legislation of 1852, 1854, 1855, and 1856.

INFERIOR COURTS OF LAW.

[We have seen to what an extent the new County Courts hold a *divisum imperium* with the Superior Common Law Courts. The number of the former is sixty, the judges of which are appointed by the Lord Chancellor; must be barristers of seven years' standing, or have practised for seven years as barrister and special pleader; † are removable for "*inability or misbehaviour*" (stat. 9 & 10 Vict. c. 95, § 18), and if afflicted with some permanent infirmity disabling from the due execution of their office, and desirous of resigning it, the Lord Chancellor, on their petition, may order them an annuity for life, not exceeding two thirds of their yearly salary. (Stat. 15 & 16 Vict. c. 15.) They are also prohibited from practising their

* *Selby* v. *Bardons*, 3 B. and Adol. 16.

† And so with the deputy judge, Stat. 19 & 20 Vict. c. 108, § 6.

profession, while such judges, either at or under the bar, directly or indirectly (§ 16).

[These courts, which are but extensions of the Courts of Requests and original County Courts, are expressly created courts of record (stat. 9 & 10 Vict. c. 95, § 3), yet are without records;* and the mode of proving what has occurred in them, is by calling some person who was present, and can speak to the particular matter of fact enquired into; but the only evidence of the official acts of the court,—its orders and judgments,—is the entry directed to be made by the clerk, in a book, under stat. 9 & 10 Vict. c. 95, § 111. Though declared courts of record, their proceedings are not according to the course of the Common Law; † as they proceed, under statutory powers, in a new summary way. The substance of the law, which they administer, however, is that of the Common Law, the principles and doctrines of which, where it is not expressly provided to the contrary, must be strictly adhered to.

[There are also many other courts, in different parts of the kingdom, with jurisdiction confined to particular spots: but often invested, within their respective localities, with as large a jurisdiction over actions, so far as regards their kind, and the amount involved in them, as the superior courts. Thus, the Court of Record of Kingston-upon Hull, is empowered by charter to "hold, for ever, in the guild-hall of the town or borough, *all manner* of pleas, suits, plaints, and demands,—also actions personal, real, and mixed whatsoever, within the town or borough and the liberties and precincts of the same, moved or to be moved; and cognizance of all pleas of trespasses, covenant, and contract whatsoever, within the town or borough, and the liberties and precincts, howsoever done, happening, or

* Per Parke, B., *Harmer* v. *Bean*, 3 Carr. and Ker. 307.

† See *Owens* v. *Breese*, 6 Exch. 920 (in Error). Therefore a writ of trial cannot be directed to them; for it would require a jury of twelve, whereas that of the County Court is five only. Id. ib.

growing." These courts are held by prescription, charter, or act of parliament; and originally arose from the favour of the crown to particular districts, for the convenience of the inhabitants, that they might prosecute their suits, and receive justice, at home. The jurisdiction of these courts was carefully preserved by the Municipal Corporation Act (statute 5 & 6 Will. IV. c. 76, §§ 118, *et seq.*), and subsequent statutes (6 & 7 Will. IV. c. 105, § 9, and 2 & 3 Vict. c. 27) make further provision for the conduct of such courts; particularly by enabling the recorder, or other judge, to make, alter, and revoke rules for regulating the practice and pleadings of the court, provided they be allowed and confirmed by three of the judges of the superior courts: which for the most part have a concurrent jurisdiction with them, or else a general superintending power, in the way already indicated.

[Besides these, there are certain other courts of a special jurisdiction—as the courts of the duchy chamber of Lancaster, and of the counties palatine of Lancaster and Durham, the stannary courts in Devonshire and Cornwall; and the courts of the universities of Oxford and Cambridge. Concerning all these it may suffice to remark, in the language of Lord Coke,* that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained; and cannot be extended further than the express letter of their privileges will most explicitly warrant.

[Before quitting the subject of the courts of law, it may be well to place before the student, in the language of the County Court Commissioners, whose report appeared in the year 1855, a lucid summary of the respective advantages and disadvantages attending the administration of justice in the Superior and County Courts.

[In the former, the means adopted for separating ques-

* 2 Institute, 548.

tions of law from those of fact; the exertions of skilled advocates accustomed to practise in the central tribunals of the country; the attendance of a learned and enlightened Bar, in whose presence each Judge is required to fulfil the functions of his office; the facility for reviewing his opinion and direction, and for appealing from the decision of the full court, are calculated to insure the satisfactory administration of justice. On the other hand, considerable delay and expense necessarily result from bringing the machinery of those courts into full activity.

[In the County Courts, the absence of any pre-appointed means of separating questions of law from those of fact, the non-employment generally of legal advocates, the non-attendance of a Bar, the rapidity of the proceedings, and the power of the Judge finally to decide on all questions of law and fact, except where the claim exceeds 20*l* in amount, render the judgment of the court less secure against miscarriage. On the other hand, the County Court is near to the residence of the suitors, and the proceedings are simple, cheap, speedy, and final.

[In claims of considerable amount, the inconveniences incident to the administration of justice in the Superior Courts, are counterbalanced by the greater certainty in the application of the rules of law, than can be expected in a tribunal so constituted as the County Court. On the other hand, in claims of small amount, the evils caused by an occasional miscarriage appear more than counterbalanced, by the advantages presented by a local tribunal, the proceedings of which are simple, cheap, speedy, and final.]

CHAPTER LV.

THE COURTS OF EQUITY, ADMIRALTY, AND OTHERS.

[As in the preceding chapter we dismissed rather summarily the history of the establishment of our Common Law Courts, so in the present must we deal with that of our Courts of Equity; referring the reader, desirous of prosecuting his researches into that obscure, but by no means uninteresting section of our judicial institutions, to the work of a late learned writer, who has made it the subject of comprehensive and elaborate investigation; * with a view to explaining how it has arisen, that so much of the laws of England as relate to Property, are administered by distinct tribunals, the Courts of Common Law and the Court of Chancery; and to point out the boundary lines between their respective jurisdictions. He could scarcely, however, have anticipated how much would be done by the legislature, within a very few years, to obliterate the distinctions which he had been so laboriously illustrating.

[We have, in an early chapter, given a slight outline of the province of equity, and its relation to law; † for which we were indebted to the hand of a master, the late

* Equitable Jurisdiction of the High Court of Chancery, comprising its Rise, Progress, and Final Establishment, by George Spence, Esq., Q. C. In two volumes, A.D. 1846, 1849.

† Ante, Chap. IX., pp. 67—69.

Lord Redesdale. A second, and far greater authority, the late Lord Eldon, said, in the course of a case before him,* "Lord Chief Justice De Grey said, that he never liked equity so well, as when it was like law. On the day before, I had heard Lord Mansfield say, that he never liked law so well, as when it was like equity: remarkable sayings of these two great men, which made a strong impression upon my memory." On another occasion, that mighty lawyer also thus expressed himself, in advising a gentleman commencing his studies. "I know from long personal observation and experience, that the great defect of the chancery bar, is its ignorance of common law: and, strange as it should seem, yet almost without exception it is, that gentlemen go to a bar where they are to modify, qualify, and soften the rigour of the common law, with very little notion of its doctrines or practice." Another great master of both law and equity, Lord St. Leonards, said, many years ago,† "As the law of property is now administered in the different forms of law and equity, in this country, allowing for the imperfection of all human laws, it exhibits a splendid and comprehensive code of jurisprudence; and that man will deserve ill of his country, who shall ever attempt to confound the rules by which the courts of law and equity are severally guided."

[Whatever weight may be due to this expression of opinion, by so eminent an authority, the legislature has lately, as we indicated in the last chapter,‡ taken a great stride in this direction, by arming the courts of law, with some of the greatest powers hitherto exercised exclusively by courts of equity. The former may now, in all actions, except Ejectment and Replevin, award a Writ of Mandamus (which is quite distinct from the prerogative Writ of MANDAMUS),§

* *Dursley* v. *Fitzharding Berkeley*, 6 Ves. 260.

† Letters to a Man of Property on the Sale of Estates. Ante, p. 7, (*n.*)

‡ Ante, p. 519.

§ Common Law Procedure Act, 1854, § 75.

—"commanding the defendant to fulfil *any duty* in the fulfilment of which the plaintiff is personally interested" (§ 68); words so comprehensive, that they may lead to the most important changes in the administration of civil justice, and effect an immense inroad on that portion of the domain of equity, which consists in enforcing SPECIFIC PERFORMANCE. But the same is the case with that of Injunction: for (§ 79) in all cases of breach of contract, *or other injury*, the party injured, and who has brought the action, may claim a writ of INJUNCTION, against the repetition or continuance of such breach of contract, or other injury, or the committal of *any* breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also, in the same action in which he claims this writ of injunction, include a claim for damages, or other redress. And so with DISCOVERY—for courts of law are now, by stat. 15 & 16 Vict. c. 99, § 6, authorised to grant an inspection of documents, (in all cases where a court of equity may order it,) on which the action and defence is immediately founded, and of documents necessary for the purposes of evidence, in which the applicant has a direct interest, and which are held by his opponent in a fiduciary character. And, by the Common Law Procedure Act, 1854, § 50, either party to an action, making affidavit of his belief that such an instrument is in the possession or power of his opponent, may apply for an order that he shall answer on affidavit, stating what documents he has in his possession or power, relating to the matter in dispute; or what he knows as to the custody they are in; and whether he object, and on what grounds, to the production of such as are in his possession or power. And again, the province of equity is further invaded in the matter of INTERROGATORIES: for either party to an action may obtain leave from a judge, to deliver to the other, with his pleadings, written interrogatories on any matter in which discovery may be sought, and require answers by affidavit, on pain of

being proceeded against for contempt:—and, if the written answers be insufficient, an oral examination may be ordered by the court or a judge, before a judge or master.

[As if this had not been sufficient, the legislature has gone still further, and boldly given the courts of common law, as we have seen in the preceding chapter,* power to entertain EQUITABLE CLAIMS, and DEFENCES. First, in the case of a lost bill of exchange, or other negotiable instrument, the common law court, or a judge (§ 57), may order that such loss shall not be set up, provided an indemnity be given against the claims of any other person on such instrument:—the only mode of proceeding in such a case, till then, having been by a bill in equity, under statute 9 & 10 Will. III. c. 17, § 3. And again, a similar course may now be pursued, instead of resorting to a court of equity, under the statute (53 Geo. III. c. 159) for limiting the responsibility of shipowners. Secondly, wherever a defendant, or plaintiff in replevin, would heretofore have been entitled to obtain relief, in a court of equity, against a common law judgment, he may now, in the court of law, plead the facts which would have entitled him to such relief, by way of defence, heading his plea, "For defence on equitable grounds, or words to that effect;" or, if the subject-matter of it arose after the time for pleading had elapsed, it will be available by *auditâ querelâ* (§ 84). And, in his turn, a plaintiff may answer any plea of the defendant, by a replication, showing facts avoiding the plea, on equitable grounds.

[Thus, as in the former chapter we commenced by exhibiting the inroads made on the jurisdiction of the superior courts of common law, by the newly-established county courts, so in the present we have sketched the vast encroachments made by those superior common law courts upon the province of their powerful sister Equity: which

* Ante, p. 518.

may seem to afford a sort of compensation to the former, for the loss of jurisdiction sustained by the encroachments upon them of the county courts. What may be the practical results of this transfer of so much of equitable jurisdiction to the common law courts; how great or how small may be the change really effected; it is not easy to foresee, and would be folly to predict.

[Quite as great improvements have been effected in the courts for administering equity, as in those of common law; the interposition of the legislature for that purpose, during the last thirty years, having been almost incessant.—There are now four ordinary courts of equity. Over one presides the Master of the Rolls; and, over each of the other three, a Vice-Chancellor. In the year 1851 the Court of Appeal in chancery was reconstructed, by statute 14 & 15 Vict. c. 83. It now consists of the Lord Chancellor and two Lords Justices of Appeal; and all its power may be exercised by the lord chancellor, sitting with only one of the lords justices; or by both the lords justices, sitting together, as such court, apart from the lord chancellor, either in his absence from the Court of Chancery, or while sitting there. The lord chancellor, however, while sitting alone or apart, has the same powers which they have, as well as all his own former authority: and the Court of Appeal exercises all former authorities and duties, judicial and ministerial, previously exercised by the lord chancellor. The decrees and judgments of the court are subject to appeal to the House of Lords (§ 10).

[The office of Master in Chancery was abolished in the year 1852 (statute 15 & 16 Vict. c. 80) because the proceedings before them were attended with great delay and expense; and provision was made by the same act, for the more speedy and efficient despatch of business in the Court of Chancery. The Master of the Rolls, as well as each of the three Vice-Chancellors, now sits in chambers for the despatch of such business as may be properly transacted there, with

the same powers which they respectively exercise in open court (§§ 11, 13). The proceedings are by summons, and may be despatched by the judge or the clerks, appointed for that purpose by the act, according as the judge may determine what is fit to be heard by himself, or them. A great number of other regulations for the prompt and efficient despatch of business, analogous to those which exist in the courts of common law, have been effected by this act, and two others in the same year (cc. 86, 87). By the former of these two (c. 86) the practical procedure in the Courts of Equity has been entirely remodelled by as bold and salutary reforms of pleading, practice, and evidence, as those contained in either of the recent Common Law Procedure Acts. For Bills engrossed on parchment, are now substituted printed Bills of Complaint or Claim, the price of copies being fixed; the old mode of taking evidence is abolished, and a new one substituted, including the oral examination of witnesses. Courts of Equity may now determine the legal right and title in all questions of law where equitable relief is sought; and have no longer power to direct a Case to be stated for a Common Law Court; while the lord chancellor and other judges may, like the common law judges, make general rules and orders, which must be laid before parliament, for regulating the proceedings of the courts. The latter act (c. 87) is for the relief of suitors from the oppressive fees and emoluments formerly exacted.

[The general scope and tendency of these great changes, is to place the administration of justice in our Courts of Equity pretty nearly on a footing with that in our Common Law Courts, with a view to making both prompt, economical, and efficient.

COURTS OF ADMIRALTY, BANKRUPTCY, INSOLVENCY.

[In the year 1840 the Court of Admiralty was entirely reconstructed; * its practice improved, and civil jurisdiction extended, and assimilated, in many important particulars, to that of the Common Law Courts; especially in taking evidence *vivâ voce*, in open court, compelling the attendance of witnesses and production of documents, and granting new trials, making rules of court, and committing for contempt. Appeals from the decision of this court lie, as we have seen, to the Judicial Committee of the Privy Council, of which the judge of the Admiralty Court is a member.

[Such changes are contemplated in the constitution and practice of the Ecclesiastical Courts, as to render it unsafe to give here any account of that jurisdiction; of which, in its existing form, an outline may be found elsewhere.†

[Jurisdiction in Bankruptcy, primary and appellate, is exercised by the Court of Bankruptcy, which is declared a court of law and equity for that purpose. The nature of its constitution may be seen in the early sections of the Bankrupt Law Consolidation Act, 1849.

[Jurisdiction in Insolvency is exercised by "The Court for the Relief of Insolvent Debtors in England," established by stat. 1 & 2 Vict. c. 110. The Commissioners of this court no longer make circuits through the kingdom, sitting in London only; the petitions for relief of country insolvents being heard in the County Courts; which in this, as in other instances, have recently had duties cast upon them far beyond the scope and object of the original institution of those courts.]

* 3 & 4 Vict. cc. 65, 66.

† See Warren's Law Studies, Chapter XIII. pp. 627—662 (2nd Ed.).

CHAPTER LVI.

COURTS OF RECORD; CONTEMPTS; EXCESS OF JURISDICTION; APPEALS.

[HAVING thus exhibited an outline of the different courts of primary, as contra-distinguished to appellate, jurisdiction, several matters common to them all, remain to be noticed.

[i. And first there is an important distinction between those which are "of record," and those which are "not of record." By the former is meant one whose acts and judicial proceedings are enrolled, or "recorded," as a perpetual, intrinsic, and exclusively admissible testimony * of all the proceedings comprised in it; no collateral proof being admissible, to impeach its authenticity or accuracy so long as it stands unreversed.

[ii. The distinction in question involves one important circumstance: that, to Courts of Record is incident the power of punishing, by fine and imprisonment, for contempt. "That a court of record has a power to fine a party who is not then present before them," says Mr. Justice Bayley,† "but who has been guilty of a contempt, I entertain no doubt; for otherwise, his contempt in not appearing before them, would prevent his being punished for the previous contempt

* Stephen on Pleading, 25, (3rd Ed.)
† *The King* v. *Clement*, 4 B. & Ald. 231.

of which he had been guilty." In a recent case * relating to a committal by the Court of Chancery (a court of record) in the Isle of Man, for contempt, in publishing libellous matter of the court, Mr. Justice Erle observed, "The commitment here, was for a contempt in publishing, while the court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the court. In the elaborate judgment of Willes, C. J., it is shown that such a publication may have a strong and immediate tendency to paralyse the proceedings of the court." The committal was upheld, though it was "until *further order*"—such appearing to be the practice of the court; but Mr. Justice Patteson added, that no English court would commit by way of punishment, except for a time certain. All such courts are called the Queen's Courts, in right of her crown and royal dignity; and therefore have this power of vindicating their authority; a power so important as to require the greatest nicety in its exercise.† Those courts, which are not of record, are not of sufficient dignity and authority to be called the Queen's Courts, or armed with power to fine or imprison the subjects of the realm, except such power be expressly conferred by the legislature. This it has thought proper to do, in the case of the recently created County Courts: which, as we have seen,‡ it expressly enacts shall be courts of record, and also as expressly invests with power to punish for contempt, by fine and imprisonment, to a specified and limited extent, in the case of any one who "*wilfully insults*" the judge, or a juror, or officer of the court, during his sitting, or attendance in court, or in going to, or returning from it; or who wilfully interrupts

* *Crawford's case*, 13 Q. B. 613.

† Per Lord Abinger, *The King* v. *Faulkner*, see 2 C. M. & R. 532. "No judge, whilst separately discharging his judicial functions, in chambers, as ancillary to the general business of the court, has ever yet ventured to act as a court of record, by punishing a man for a contempt." id. p. 533.

‡ Stat. 9 & 10 Vict. c. 95, § 113.

the proceedings, or *otherwise misbehaves* in court. It is obvious, in the language of the Court of Common Pleas, on a recent occasion, that many acts may come within this provision, which it would be impossible adequately to define in words; and the judge has jurisdiction to decide, conclusively, whether any particular act did amount to an "insult," "interruption," or "misbehaviour."* It is unnecessary for him to say more, in the warrant of commitment for the contempt, than that he had been wilfully "insulted."† The power which the legislature has thus expressly conferred on these courts, is incident by common law, to all other courts of record, whether superior or inferior.;‡ and a contempt is the only case in which the common law authorises a summary conviction.§

¶A contempt thus promptly punishable, consists, as far as regards our present purpose, of rude and contumelious behaviour, by either words or acts, in the face of the court. "Every insult offered to a judge," said Lord Cottenham,‖ "in the exercise of the duties of his office, is a contempt:" anything, in short, to use the language of Blackstone, which demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people; for laws, without a competent authority to secure their adjudication from disobedience and contempt, would be vain and nugatory.¶ "In the case of an insult to himself," said Mr. Justice Holroyd,** "it is not on his own account that the judge commits, for that is a consideration which should never enter his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those

* *Levy* v. *Moylan and Others*, 1 Prac. Cas. 317. † id. ib.

‡ Per Holroyd, J., in *Rex* v. *Clements*, 4 B. & Ald. 233.

§ 4 Bla. Com. 278.

‖ *Charlton's Case*, 2 Mylne & Craig, 239.

¶ 4 Comm. 286. ** *Rex* v. *Davison*, Ald. 329.

things to pass, which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence, at least, it shall not be infringed." Lord Tenterden, on the same occasion, said, "It is utterly impossible that the law can be administered, if those who are charged with the duty of administering it, have not the power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public;—and a judge will depart from his bounden duty, if he forbear to use it when occasions arise which call for its exercise." In the case then before the court, a judge had fined a defendant, conducting his own defence to an indictment for a blasphemous libel, three successive fines, one of twenty, and two of forty pounds, for an insult to the judge, reviling the christian religion, and calumniating third persons (the Bishops) not before the court. The Court of King's Bench unanimously upheld this exercise of judicial authority; declaring also, that the judge alone is competent to determine, whether what is done, be or be not a contempt; and that neither that court, nor any co-ordinate court, had a right to examine the question, whether his discretion in that respect had been fitly and properly exercised.* In France such contempts are punished with great severity. By the *Code Penale*, art. 222, when any executive or judicial officer shall, during, or on account of, his official duties, be insulted in open court, (par paroles tendant à inculper leur honneur, ou leur délicatesse,) the offender shall be imprisoned for not less than two years, nor more than five. In this country, owing as well to judicial discretion and forbearance, as the universal and deep-seated respect entertained for the administration of justice, the exercise of the power under consideration is very rare; but it is well that its existence should be known.

* *Vide quoque, Crawford's case*, 13 Q. B. 628.

[iii. Efficient provision is made by our law to restrict courts to the exercise of jurisdiction within the limits respectively assigned them. Acts done beyond, or without jurisdiction, are utter nullities, however advanced may be the stage of the proceedings; and it is a fixed rule, that consent cannot give jurisdiction: were the contrary to be allowed, it would lead quickly to the confusion, and indeed subversion, of all jurisdiction.—It is the duty of a court to exercise its powers, even though the judge doubt as to his jurisdiction,* if the parties do not question it: but it is to be presumed, that a court deals only with the matters within its jurisdiction.† If, however, a doubt arise on that question, the solution of that doubt by the court itself, cannot be final.‡ The question must be determined by a superior court, on motion for a prohibition. Where an authority is conferred, to do a certain act, its exercise by those authorised is *imperative*, when duly applied for by a party interested, and having a right to do so.§ The Court of Queen's Bench will enforce the due exercise, by an inferior court, of its judicial and ministerial powers; and it will, on the other hand, be prohibited from entertaining or prosecuting any matter beyond its jurisdiction, and appertaining to that of another tribunal. How this is done, may be readily seen, in law books, under the heads, *Mandamus*, *Certiorari*, *Prohibition*, *Procedendo*.

[Whatever be the court, if it assume a jurisdiction which it has not, its decision is so entirely a nullity, that it does not create any necessity for an appeal from it,|| and every thing done under such a usurped authority, is not only a nullity, but may entail serious liability on those enforcing it. A judge of record, whether superior or inferior, is not liable, either civilly or criminally, for any act done by him, however erroneously, in the exercise

* *Winch* v. *Winch*, 22 Exch. C. P. 104, (N.S.)

† *Thompson* v. *Ingham*, 14 Q. B. 718, per Patteson, J. ‡ Id. ib.

§ *Macdougal* v. *Patterson*, 11 C. B. 755.

|| *Attorney General* v. *Lord Hotham*, Turn. & Russ. 219.

of his judicial functions, provided that act were done within the scope of his jurisdiction: "a rule," observes Mr. Chancellor Kent, "of very great antiquity, and maintained steadily, by an undisturbed series of decisions in the English courts, amidst every change of policy, and through every revolution of their government. This freedom is given by the law to the judges, not so much for their own sakes, as for that of the public, and the advancement of justice; that being thus free from liability, they may be free in thought and independent in judgment.* It is very far otherwise, however, if the judge act beyond his jurisdiction. A judge of a court of record is answerable in an action for damages, for an act done by his command, where he has no jurisdiction, and is not misinformed as to the facts on which his jurisdiction depends. If, therefore, the act be done, or the order made, under a mistake of the law, which he is bound to know, and not of the facts, the judge is liable in trespass.† It lies, however, on the plaintiff to prove that the judge knew, or ought to have known, of the defect;‡ the question as to the jurisdiction, depending on the state of the facts as they appeared, at the time, to the magistrate or judge assuming to have the jurisdiction.

[It is to be observed, finally, that as it is the right of every Englishman to apply to the courts of justice for redress of injuries, for which purpose they are at all times open, as we have seen, to the subject;§ so no agreement which is to prevent the suffering party from coming into those courts, or which, in other words, ousts them of their jurisdiction,|| can be pleaded as a defence, but an agreement to refer future differences to arbitration may be enforced by action.¶

[iv. To complete this outline of the scheme of English

* See Broom's Maxims, 61, and the instructive judgment of Lord Brougham, in *Ferguson* v. *Earl Kinnoull*, 9 Clark and Finn. 251.

† *Holden* v. *Smith*, 14 Q. B. 841.

‡ Per Parke, B., *Calder* v. *Halkett*, 3 Moore Privy C. Cas. 76.

§ Ante, Chap. XII. p. 109. || *Scott* v. *Avery*, H. of L. 10 July, 1856.

¶ *Livingston* v. *Ralli*, 24 L. J. N.S. Q.B. 269.

jurisdiction, it is necessary to advert briefly to the arrangements for reviewing and correcting erroneous procedure, though within jurisdiction, by way of Appeal. We do not conclude a subject of these realms, by the decision of a solitary and fallible tribunal, whether consisting of one individual or several, however profound their learning, on questions affecting his rights or duties. Every just and reasonable facility, on the contrary, is afforded, for submitting a decision, if it be challenged by any one whom it affects, to a fresh tribunal, unembarrassed by, and not committed to, a previously expressed opinion. A great and salutary principle, however, must be borne in mind, and is expressed in the maxim, *Interest reipublicæ ut sit finis litium*: in which is included another, *Nemo debet bis vexari pro eâdem causâ.** To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous. It is better for the general administration of justice, that an inconvenience should sometimes fall upon an individual, than that the whole system of law should be overturned, and endless uncertainty introduced.†

[The verdict of a jury may be set aside, if deemed by the court unsatisfactory, and that more than once, or even twice, but this is not done without due consideration, for the utmost respect is, *primâ facie*, due to the verdict of a jury.—The order of a judge at chambers, or his ruling at *nisi prius*, may be reviewed by the court; the decision of one court by the other two sitting in error in the Exchequer chamber; and their decision, finally, by the House of Lords.

[The award of an arbitrator may be set aside, varied, or sent back to him for re-consideration, if he have not properly adjudicated upon the matter referred to him, but it must

* Broom's Max. p. 254.
† Id.; and see Per *Cur. Reg.* v. *Justices of West Riding*, 1 Q. B. 631.

be mentioned, as a general rule, that an arbitrator having been voluntarily substituted by the parties, for a court and jury, they must be bound by his decision, whether he be lawyer or layman, though he may have been mistaken in both law and fact, unless the mistake be on the face of his award, and the law quite clear; or unless the mistake be so gross as to imply misconduct in the arbitrator; or unless the award have been obtained by "corruption or undue means" (stat. 8 & 9, Will. 3. c. 15, § 2.).—The decision of a revising barrister, on points of law, may be brought before the court of common pleas, on appeal.—The judgments of inferior civil courts of record, may be examined by the court of queen's bench, and those of the new county courts by the tribunal specially appointed for that purpose: those of the court of bankruptcy, by a vice-chancellor, and successively by the lord chancellor, and house of lords, if he deem the question of sufficient difficulty or importance.*—The decision of the insolvent debtor's court, discharging a prisoner, is final, and subject to no appeal; but the court itself may annul its adjudication, if obtained by false evidence, or otherwise improperly, and remand the delinquent debtor to his former custody. He is also liable, after his final discharge, to be summoned before the court, and examined on oath relative to his estate and effects.†—The decrees of the master of the rolls, and three vice-chancellors, may be examined by the court of appeal, and afterwards by the house of lords;—those of the admiralty, ecclesiastical, and foreign courts within the British dominions, by the judicial committee of the privy council.

[The orders of justices, exercising summary jurisdiction, may, subject to certain restrictions, be the subject of appeal to a court of quarter sessions; whose decision may

* Bankrupt Law Consolidation Act, 1849, § 18.

† Stat. 1 & 2 Vict. c. 110, §§ 90, 96, 98.

be referred, if that court think fit, to the court of queen's bench,—which may also, on *certiorari*, quash orders and convictions; and any question of law, which may have arisen on a criminal trial, before a court of quarter sessions, at the assizes, or before the central criminal court, may, in the exercise of the presiding judge's discretion, be submitted to the criminal appeal court, constituted in the year 1848, by stat. 11 & 12 Vict. c. 78: and which has been justly characterised as perhaps the greatest improvement ever made in the administration of our criminal law, as far as relates to indictable offences. This, however, will be more fully considered in a subsequent chapter.

[The proceedings of courts-martial are conducted on the principles of the common law courts, and, in the language of the late Duke of Wellington, founded on, and in a great measure analogous to, the proceedings of the other courts of law, and bound to be conducted, except where the mutiny act may have otherwise ordered, according to the ordinary law of the land. The courts of common law can prohibit the execution of an illegal sentence pronounced by a court-martial; but neither legal nor equitable courts can reverse or alter its sentence. The queen may, undoubtedly, if she should think fit, though such power has not hitherto been exercised, refer such a matter to the judicial committee of the privy council, under the unlimited powers conferred by statute 3 & 4 Will. IV. c. 4, § 4;* but the course usually adopted by one complaining of being aggrieved by the decision of a court-martial, which is submitted for the personal approval of the queen before being promulgated, is to memorialise the commander-in-chief for a revision of the sentence, who will, if he think fit, refer the matter to the judge-advocate-general for reconsideration.

[The ultimate and supreme court of appeal, in all cases of law and equity; for the whole united kingdom; is, subject

* Ante, p. 220, Chap. XXI.

to the exceptions already indicated, and certain other inconsiderable ones, the house of lords. For the history of the jurisdiction exercised by it as the high court of parliament,* reference may be made to the work of a learned person already several times referred to.† This august tribunal should take care, in the language of Blackstone, to preserve an uniformity and equilibrium among all inferior jurisdictions. "It is a court," he continues, "composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors: who are formed by their education, interested by their property, and bound upon their conscience and honour, to be skilled in the laws of their country." The practical qualification of this, however, in modern times, has been given in an early chapter,‡ where it is explained that the duties of the house of lords, as a court of appeal, are in reality discharged solely by the judicial peers. It has been well observed by Mr. Justice Coleridge,§ that it was not upon any such refined reasoning as that of Blackstone, that the peers have become, in our constitution, the court of last resort. At the same time, it is probable that the great trust can be nowhere else so properly reposed. It is not that the lords are presumed by the constitution to be better acquainted with the law than the judges, whose decisions they are called upon to review: and whom the constitution, on the contrary, makes their dignified attendants, for the purpose of informing them on the law. But when questions have been thoroughly discussed before tribunals in which the best talents, the largest experience, and the soundest knowledge are supposed to preside, it is felt that, for settling them definitively, *authority* is wanted more than new light. In a difficult case, the lords usually pronounce the judgment

* Ante, p. 215. † Macqueen's Practice of the House of Lords.
‡ Chap. II. Ante, pp. 9, 10. § 3 Bl. Com. p. 12, note 2.

dictated by the fifteen judges, though they may totally disregard them:* yet every one must be sensible that the judgment, even when so adopted and pronounced, is far more weighty as the decree of that august tribunal, than it would be as the decision of fifteen judges, affirming or overruling a previous judgment of other judges.

[The proper constitution of the supreme court of appeal, justifies the utmost solicitude of the legislature and the country. The difficulties surrounding its reconstruction, were found too great to admit of solution during the session of 1855-6, unexpectedly complicated as they were, by the creation of that very distinguished judge, Baron Parke, a *peer for life only*, as Lord Wensleydale. The greatest constitutional lawyers in the House of Lords, supported by a considerable majority of the peers, declared that the crown had no power to create a peer for life only, with a right to sit and vote in that House; that such an act was *illegal*, and that the very essence of the British peerage consisted in its hereditary character. Issuing out of these discussions, a Bill for reconstructing the Appellate Jurisdiction, was sent down from the Lords to the Commons, but so late in the session, that they declined then to entertain it.—Whatever may be the ultimate fate of this measure, it is still practicable, even without adopting its special machinery, to preserve the Appellate Jurisdiction of the House of Lords,—itself an object of the highest importance,—by providing for more assistance from the legal and equitable judicial force of the country. In the meantime, a well-earned hereditary peerage was conferred on Lord Wensleydale, under which he took his seat before the session closed.

* On two recent occasions, and in cases of great public interest and importance, a majority of the law Lords concurred with minorities of two of the Judges. See *O'Connell* v. *The Queen*, 11 Clark & Fin. 155, and *Egerton* v. *Earl Brownlow and Others*, 23 Law J. (N.S.) Chanc. 348.

CHAPTER LVII.

SUPPOSED UNCERTAINTY OF THE LAW.

[3 Bla. Com. 325—330.]

THE uncertainty of legal proceedings, is a notion generally adopted, and has long been the standing theme of wit and good humour. Yet it may be not amiss to inquire a little wherein this uncertainty consists; and to what causes it owes its original.

It hath been sometimes referred to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate with and thwart each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact of multiplicity is allowed, and that thereby the researches of the student are rendered more difficult and laborious; but not that, with proper industry, the result of those inquiries will be doubt and indecision. People are apt to be angry at the want of simplicity in our laws; hastily mistaking variety for confusion, and complicated cases for contradictory. They bring us the examples of arbitrary governments; of wild and uncultivated nations; or of domestic republics in ancient and modern times; unreasonably requiring the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

In an arbitrary despotic government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds, in a stronger degree, with regard to goods and chattels, and the contracts relating to them. Under a tyrannical sway, trade must be continually in jeopardy, and of consequence can never be extensive: whereby an end is put to the necessity of an infinite number of rules, to which the English merchant daily recurs for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few, also, are the persons who can claim the privilege of any laws; the bulk of those nations, viz., the commonalty, boors, serfs, or peasants, being merely villeins and bondmen. Those are, therefore, left to the private coercion of their lords; are esteemed, in the contemplation of these boasted legislators, incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

Were we, again, a poor and naked people, like the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we meet upon the road, and so put a short end to every controversy. For in such a rude state of mankind, there is no room for municipal laws: and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables; but as

luxury, politeness, and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's household are necessarily more various and diffuse.

The causes, therefore, of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way; and it is essential to a free people, that these determinations be published and adhered to; that their liberties and property may be as certain and fixed as the very constitution of their state. For though, in many other countries, every thing is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes, though rarely, interfere with each other: either because succeeding judges may not be apprised of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or in fine, because of the natural imbecility and imperfection that attend all human proceedings. But wherever this happens to be the case, in any material point, the legislature is ready, and from time to time, both may,

and frequently does, intervene to remove the doubt; and upon due deliberation had, determines, by a declaratory statute, how the law shall be held for the future.*

Whatever instances, therefore, of contradiction or uncertainty may have been gleaned from our records or reports, must be imputed to the defects of human laws in general, and not to any particular ill construction of the English system. The reverse, indeed, is strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance the civil law: the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists, are literally without number. And these glosses, which are mere private opinions of scholastic doctors, (and not, like our books of reports, judicial determinations of the court,) are all of authority sufficient to be vouched and relied on: which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law; though the text thereof is not of half the antiquity with the common law of England; and though the more ancient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When, therefore, a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection in such as have built the superstructure.

But is not, it will be asked, the multitude of law-suits which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for among the various disputes and controversies which are

* Ante, p. 29, Chap. IV.

daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances, and testaments. It is an object, indeed, of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations, marked out by the prudence, convenience, necessities, or even the caprice of their owners: yet to investigate the intention of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and properties, of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but, what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past: and will continue to be disputed as long as the carelessness, the ignorance, or singularity of the testators shall continue to clothe their intentions in dark or new-fangled expressions.

But notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison, in point of number, to those which are founded upon the dishonesty and disingenuity of the parties; by their either suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritur jus*: if, therefore, the fact be perverted or

misrepresented, the law which arises thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.

These modes of probation, or trial, form, in every civilised country, the great object of judicial decisions. And experience will abundantly show, that above a hundred of our law-suits, arise from disputed facts, for one where the law is doubted of. [Doubtful and obscure points of law are not nearly so numerous, observes Dr Paley, in a chapter worthy of attentive consideration,* as they are apprehended to be. Out of the multitude of causes which in the course of each year are brought to trial in the metropolis, or upon the circuits, there are few in which any point is reserved for the judgment of superior courts. Yet these few contain all the doubts with which *the law* is chargeable: for, as for the rest, the uncertainty is not in the law, but in the means of human information.]

* Moral and Political Philosophy. Book VI. c. viii.

CHAPTER LVIII.

EVIDENCE AND WITNESSES.

[SUCH fundamental changes have been effected in the law of evidence within the last ten years, or even a much shorter period, that it may be said to stand upon quite a new basis, and to be thoroughly illuminated by the light of good sense. In no department of our jurisprudence has the hand of innovation been bolder or more successful. The legislature has liberated the law of evidence from shackles which had for centuries impeded its search after truth; and whoever can contrast the present with the very recent state of that law, will feel astonishment that such impediments should have been tolerated so long. English law books swarm with complex rules, and decisions of courts carrying out those rules with a sort of relentless and excruciating ingenuity, the effect of which is now seen by all, to have been only to shut, carefully, as many apertures as possible, through which that truth might be seen, which courts of justice were instituted to discover. This arose from a marvellous distrust of the conscientiousness of witnesses, and the intelligence of juries, together with an inversely strong confidence in the means resorted to by law for obviating such evils.* To see whether these remarks are

* A popular sketch of the former and existing Law of Evidence may be seen in Chapter xxv. of Warren's Manual of Parliamentary Election Law. Vol. II. pp. 580—628.

well or ill-founded, it may be observed, that down to the year 1843, the law excluded from the witness-box a person of spotless integrity, of the greatest intellect, and beyond all suspicion of undue bias or motive, if it could only be made out by a train of subtle reasoning, that he might have a single farthing's interest in the ultimate issue; while the same law admitted into the witness-box those influenced and tempted, by the strongest ties of natural affection, to deceive.

[At length, in the year 1851, after a series of steps in that direction, the legislature, by a single section of statute 14 & 15 Vict. c. 99, let in a flood of light on every question thenceforth made the subject of legal investigation, by removing the incapacity of THE PARTIES themselves to any legal proceeding. This effected a complete revolution in this extensive department of the law. Those who had for ages stood with sealed lips in courts of civil justice, while their characters, properties, rights, and liberties were assailed, by falsehood and fraud, with perfect impunity; those who alone knew the true facts in dispute, and yet were compelled to look on with silent indignation, while futile and illusory efforts were being made to prove those facts, were, by the *fiat* of the legislature, suddenly given the power of speech, and enabled, in their own persons, *vivâ voce*, or by affidavit, to state those facts before competent authorities. From that moment fraud and chicane received a desperate check; and claims were justly enforced and resisted, which would otherwise have continued to be withheld, or submitted to, unjustly. It must not, however, be disguised, that these great advantages have been not unattended with the countervailing disadvantages of exposure to a temptation to commit perjury, too frequently proving irresistible.

[Subject to exceptions deemed by the legislature expedient to be maintained, and which will be immediately specified, thus now stands the law: "On the trial of *any* issue joined,

or of *any* matter or question, or on *any* enquiry arising in *any* suit, action, or other proceeding, in *any* court of justice, or before *any* person having, by law, or by consent of parties, authority to hear, receive, and examine evidence," all persons who have the use of their reason, and believe in a God who, whether here or hereafter, will reward or punish them according to their deserts, are COMPETENT and COMPELLABLE to give evidence either *vivâ voce*, or by deposition, on behalf of either or any of the parties. The following are the exceptions to this rule. First, the parties to criminal proceedings (and those instituted in respect of offences, penalties, and forfeitures relating to the revenue*), are not competent or compellable to give evidence for or against themselves. Secondly, no person is compellable to answer any question tending to criminate himself. Thirdly, no husband or wife is competent or compellable to give evidence for or against each other in any proceeding instituted in consequence of adultery, or in any criminal proceeding (except when either is indicted for a personal injury to the other, in which case the common law enables either to give evidence against the other). Fourthly, no husband or wife is compellable to disclose any communication made to either by the other, during marriage; † and lastly, in an action or suit, instituted in consequence of adultery, and in an action for the breach of a promise of marriage, neither of the parties is admissible as a witness. No one, in fact, appears now excluded from giving evidence, that can be admitted with a due regard to liberty, public decorum, and the delicacy and confidence which should subsist between those intending to enter into the sacred contract of marriage.—An affirmation may be substituted for an oath, whenever the latter is deemed unlawful by the witness on religious grounds; and when he is sworn, the oath must

* Stat. 17 & 18 Vict., c. 122, § 15.

† The Provisions of the Wills Act of 1837 (ante p. 454) are not affected by Statutes 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

be administered in the form which he declares binding on his conscience.

[Infants of very tender years are admissible, if the judge, or other person entitled to examine them, be of opinion that they have competent discretion to comprehend the nature of an oath. Also a person convicted of any crime whatever—even of perjury—is competent to give evidence, even against those with whom he is jointly indicted, as well as in other cases. His conviction affects merely his credit as a truthful witness, in the estimation of the jury—as, indeed, in the case of all other witnesses. Corresponding changes have just been effected in the law of Scotland, by statutes 15 & 16 Vict. c. 27, amended by statute 16 & 17 Vict. c. 20.

[It must be observed, that the presumption of law is in favour of the competency of a witness, and that presumption must be rebutted by evidence submitted, not to the jury, but the judge; * who, in cases of doubt, is always disposed rather to receive, than reject a witness; allowing the objection to go to his credibility, rather than his competency. And this points to a cardinal distinction, essential to understanding the scope of the great and fundamental change of which we have been speaking; what is meant, being the distinction between the competency, and credibility, of a witness. He is *incompetent* to be heard in the witness-box, when the judge is bound, as a matter of law, to reject his testimony, not permitting him to open his lips either on any, or only some part, of the matter in issue. In all other cases the witness may deliver his testimony, the *credibility* of which is to be weighed by the jury, as their grand and proper function. That of the judge is perfectly distinct, and absolutely indispensable to the performance of their duty, by the jury: namely, to see that no proper evidence is excluded, and no improper evidence admitted.

* *Bartlett* v. *Smith*, 11 M. & W. 483. *R.* v. *Hill*, 2 Den. C. C. 254.

When it has been, so to speak, filtered through the judicial medium, it must be left to act on the conscience and understanding of the jurymen. Now the scope of most of the recent changes has been, to augment the responsibility of the jury, by increasing the elements with which they have to deal, and proportionably restricting the province of the judge.]

The * open examination of witnesses, *vivâ voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination, taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There, an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in that scribe's own forms and language; but here the witness is at liberty to correct and explain his meaning, at the moment, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses, is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education,

* 3 Bla. Com. 373—4.

understanding, behaviour, and inclinations of the witness; in which points, however, all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English way of giving testimony *ore tenus*. Which was also indeed familiar among the ancient Romans, as may be collected from Quintilian; who lays down excellent instructions for examining and cross-examining witnesses *vivâ voce*. And this, or somewhat like it, was continued as low as the time of Hadrian: but the civil law, as it is now modelled, rejects all public examination of witnesses.

[Highly beneficial changes were effected in the year 1854, with reference to witnesses. By statute 17 & 18 Vict. c. 34, reciting that great inconvenience arose in the administration of justice, from the want of a power, in the superior courts of law, to compel the attendance of witnesses resident in one part of the united kingdom, at a trial in another part, and the examination of such witnesses was not in all cases a sufficient remedy for the inconvenience;—the courts of law in England, Scotland, and Ireland, or any judge of any them, is enabled to compel the personal appearance of any witness at any trial, wherever he may be in the united kingdom. An oath may be dispensed with, and a solemn affirmation or declaration substituted, in the case of *any* person solemnly, sincerely, and truly affirming and declaring that the taking of any oath is, according to his religious belief, unlawful.* The statute effecting these last great innovations contains other important alterations in the law relating to witnesses, and the mode of dealing with evidence at a trial in every court of civil judicature in England and Ireland, and which may

* Stat. 17 & 18 Vict. c. 125, § 20. Ante, p. 285.

be conveniently noticed here. The party beginning, is entitled, at the close of his case, to make a second address to the jury, for the purpose of summing up the evidence, unless his opponent then announce that he intends to call evidence, on which the other would be entitled to reply. A similar right is given to each party.—A trial may be, by the judge, adjourned at any stage of it, if such a course be deemed right, for the purposes of justice, for such time, and on such terms and conditions, as he may think fitting.

[If, in the opinion of the judge, a witness prove adverse to the party calling him, though his credit cannot be impeached by general evidence of bad character, he may be contradicted by other evidence of material relevant facts; or by leave of the judge, it may be proved that the witness has made, at other times, a statement inconsistent with the testimony he is then giving; but the circumstances of such statement must be first called sufficiently to his attention, and he must be asked, whether or not he had made such a statement. This enactment deals, but not definitively,* with one of the greatest moot points in the law of evidence, both in this country and America. If the judge do not think fit to give the leave above specified, the old objection may still be taken, and even carried up to be determined by the House of Lords.—If a witness under cross-examination do not distinctly admit that he has made a former statement, relative to the subject-matter of the cause, inconsistent with the testimony he is then offering, proof may be given that he did in fact make it—first calling it to his attention, as in the other case. He may also be cross-examined as to any such statements in writing, without showing them to him; and may be contradicted by such writing, provided his attention be first called to such parts of it as may be used for that purpose:—but the judge, may at any time of the trial, require such writing to be proved for his own inspection; and

* See Mr. Phillips' Edition of the Common Law Procedure Act, 1854.

he may make such use of it, for the purposes of the trial, as he may think fitting.

[We have seen that no witness is now incompetent, because of a previous conviction of any kind of crime. As it is, however, of infinite consequence that a jury may judge of the extent to which the source of evidence adduced before them is tainted, if the witness, having been questioned, either refuse to answer, or deny the fact of his having been convicted of a crime, it may now be proved, and that simply by a duly authenticated certificate of it, and proof of the witness's identity.

[Unless an instrument be required by law,—as under powers, or by acts of parliament,—in order to be valid, to be attested by a witness, although it may in fact be so attested, it is now unnecessary to call him, and the instrument may be proved as though it did not bear any such attestation.—If a particular writing be disputed, it may be compared, by witnesses, with a writing proved, to the satisfaction of a judge, to be genuine; and such writings, and the evidence respecting them, of the witnesses, submitted to the court or jury as evidence of the genuineness or spuriousness of the disputed writing.—Provision is also made for obviating objection to the admisibility of an instrument as being unstamped, due regard being had, at the same time, to the interests of the revenue.

[Other great facilities have been recently afforded, also, for adducing documentary evidence, especially of a public nature; by merely producing, for instance, a copy of any act of parliament, or the journals of either house of parliament, *purporting* to have been printed by the queen's printer, or the printers of either house: and in fact, it may be said, that all instruments of a public official nature, purporting to be thus printed, are equally admissible, on their mere production. A vast class of other instruments of a public and official nature, but not in print, are provable by office copies, and examined copies,—as

entries in registers, corporation, and other books, resolutions, orders, &c. Another large class of instruments judicial or quasi-judicial, are admissible, on production, if bearing a seal, signature, or stamp, purporting to be that of the court, office, or functionary whence they emanate.

[None but practical lawyers, acquainted with a former state of the law, can fully appreciate the benefits conferred on the public, and the facilities afforded to the administration of justice, by removing those obstructions, the existence of which may be suggested by a mere glance at the foregoing paragraphs.

[With those who regard law as a science, resting on fixed and equitable foundations, and who view its decisions, not as arbitrary precedents, but valuable only as illustrating the great principles whence they emanate; the branch of our jurisprudence now under consideration, comprising the rules and practice of judicial investigation, must, says the most philosophical of our writers on the law of evidence,* exceed all others in point of interest. However widely may differ different codes, in matters of arbitrary positive institution, the general means of investigating the truth of contested facts, must be common to all. Every rational system, providing the means of proof, must be founded on experience and reason; on a well-grounded knowledge of human nature and conduct; on a consideration of the value of testimony; and on the weight due to co-incident circumstances. Here, therefore, the object of the law is identified with pure science. The common aim of each, is the discovery of truth; and all the means within the reach of philosophy, all the connections and links, physical or moral, discoverable by experience and reason, are thus rendered subservient to the purposes of justice. In different systems of law, the great principles on which the rules of evidence depend, may be, and are, variously modified; but every departure from

* The late Mr. Starkie. Law of Evidence, Vol. I. p. ix. (3rd Ed.)

those principles must constitute, wherever it occurs, a corresponding and commensurate imperfection.

[Notwithstanding,* however, the universality of the great principles of the science, it is essential to guard and limit the reception of evidence, by certain definite and positive rules. Nature has no limits; but every system of positive law must, on grounds of policy, prescribe artificial boundaries, even in its application to a subject which, from its independent nature, least of all admits of such restraint. These are necessarily for the most part of a negative description; the effect of which is, to exclude evidence in particular cases, and under special circumstances, on general grounds of utility and convenience. But to admit that which reason and experience can apply for the discovery of truth, and reject that only which serves not to guide, but bewilder and mislead, is the great principle which ought to pervade every system of evidence. It may be safely laid down, as an universal position, that the less the process of inquiry is fettered by rules and restraints, founded on extraneous and collateral considerations of policy and convenience, the more certain and efficacious will it be in its operation.

[These general observations may render doubly interesting the recent interpositions of the legislature, for the purpose of removing superfluous artificial and technical limitations and restrictions, imposed on courts of justice, in investigating truth. Other illustrations of the principles above enunciated may be found in the leading doctrines of the law of evidence,—such as that the best of which the nature of the particular case is susceptible, must be given, and that hearsay, or second-hand evidence, is, subject to certain exceptions, inadmissible. Again, what the law will presume, and on whom rests the *onus* of proof or disproof, depends on reasons of equity and sound policy, which

* Starkie, Law of Evidence, Vol. I. p. x. (3rd Ed.)

the student may, without much difficulty, learn, and in learning, appreciate and admire.—He must, finally, bear in mind, that the principles of the law of evidence which he is mastering, are of universal application: alike to law and equity, to civil and criminal proceedings. Whatever may be received in the one, may be received in the other, and whatever is rejected in the one, ought to be rejected in the other* A FACT, must be established by the same rules of evidence, whether it be followed by a civil, or a criminal consequence.

[* Per Lord Tenterden (then Abbot). *Rex* v. *Watson*, 2 Stark. Rep. 155. *Lord Melbourne's case*, 29 Howell's State Trials, 763.]

CHAPTER LIX.

TRIAL BY JURY.

[3 Bla. Com. 379—381.]

'The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected in either his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. This is a constitution which I may venture to affirm has, under Providence, secured the liberties of this nation for a long succession of ages. And, therefore, a celebrated French writer, Montesquieu, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those in England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury. [It should be borne in mind, also, that they were strangers, as we have seen, to a representative form of government, the object of which is to secure every man's attachment and obedience to the laws, by constituting him, through the representative whom he elects, one of the very makers of those laws, which it is thus at once his interest, his right, and his duty, to secure being made just and equal. But beyond all this, those ancient states were strangers to the privileges

and hallowing influences of Christianity, the only enduring source and safeguard of real liberty.]

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; for it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstract reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees: it follows as a regular conclusion from the premises of law and fact pre-established. [The premises and conclusion stand thus. *Major*: Against him who has libelled me I may recover damages by law. *Minor*: A has libelled me. *Ergo*, I shall recover damages against A. If the major be denied, it is by demurrer in law, and for the judge to determine. If the minor be denied, it is an issue in fact, for a jury to decide. If both be confessed, or found for the plaintiff, the conclusion, or judgment, cannot but follow.] But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice

have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state, will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people, that share which they ought to have, in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates, is a step towards establishing aristocracy, the most oppressive of absolute governments.

[Elsewhere,* the commentator evinces the same noble solicitude concerning the preservation of this great institution. Summary conviction he declared to be, even then, "so far extended, as, if a check were not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases." After enumerating the ill consequences flowing from this tendency, he observes, that from them "we may collect the prudent foresight of our ancient lawgivers; who suffered neither the property, nor the punishment of the subject, to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any further from our

* 4 Bla. Com. 280, *et seq.*

ancient constitution, by ordaining new penalties to be inflicted upon summary conviction." These wise cautions were never more necessary to be attended to, than in the present day, when summary jurisdiction is being constantly extended, and the functions of a jury transferred to a single magistrate, or to one or two, according, sometimes, to the age of the offender, and at others the amount of the property stolen. It is a matter of supreme concern to the country, to beware of shaking the confidence of the humbler classes of society, in the administration of criminal justice, by infringing their right to an open and formal trial by their equals, and placing them at the mercy of, it may be, an interested or prejudiced superior.] The feudal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feudal peers. And in every country on the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government, unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two.

It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable institution, in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or it have otherwise deviated from its first institution; to amend it, wherever it is defective: and above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.

[Inroads on this noble institution are, however, now being made incessantly. In criminal cases, the summary jurisdiction of magistrates is being continually increased. The elastic jurisdiction of courts of equity, abstracts a vast number of disputed facts, of the highest importance, relating to property, from the province of a jury. In common law, devices are being more and more resorted to, for the purpose of referring disputed facts to the judges, by affidavits, or to arbitrators, by *vivâ voce* evidence. In the numberless cases in the county courts, the option of having a jury is rarely exercised; and by the Law Amendment Act 1854, a judge, as we have seen, may not only compel parties to refer certain questions of fact to an arbitrator, but may by consent try cases himself, by witnesses, and pronounce a verdict, without a jury. This may be advantageous in civil cases; but in criminal, especially of a political character, any encroachment on trial by jury should be watched with stern jealousy. Even in civil cases moreover, as has been forcibly observed by the distinguished jurist already quoted from, in the preceeding chapter,* the power of deciding on matters of fact, is much more capable of abuse, and liable to corrupt partiality, *without appearing manifestly unjust*, than is the power of deciding on matters of law, which can be quickly challenged and proved unsound: but evidence offered in proof of facts, is so complex and varied, as to admit of no certain standard for judging: whence a corrupt or erroneous decision becomes the less easy of detection. The excellence of the institution in question, was never better explained than by Lord Brougham, then Lord Chancellor. "The diversity in the minds of the jury, even if they are taken without any experience as jurors; their various habits of thinking and feeling; their diversity of cast of understanding; their discussing the matter among themselves; and the very fact of their not

* Mr. Starkie.

being lawyers, but believing as men believe, and act on their belief, in the ordinary affairs of life, give them a capacity of aiding the court, in the eliciting of truth, which no single judge, be he ever so largely gifted with mental endowments, be he ever so learned with respect to past experience in such matters, can possess in dealing with either of those two matters."

[In England, in both civil and criminal cases, the verdict of the jury must be unanimous; in Scotland, the verdict may, in a criminal case, be pronounced by a majority, the jury consisting of fifteen; but of twelve in civil cases, unanimity being then, also, required, till lately, as in England. It was enacted, however, in the year 1854, by statute 17 & 18 Vict. c. 59, with reference to Scotland, that if, in a civil cause, the jury cannot agree; and if, after having been kept in deliberation for six hours, nine shall agree, their verdict may be received as that of the jury, and have the same force as an unanimous verdict:—and during the six hours, they may be furnished, by leave of the judge, with necessary refreshments. These changes were at the same time sought to be introduced into the English trial by jury in civil cases, but ineffectually; and the policy of the innovation is gravely questionable.

[In the year 1825, the laws relative to the qualification and summoning of juries, and the formation of juries, in England and Wales, being found very numerous and complicated, they were consolidated and simplified by statute 6 Geo. IV. c. 60. The first and second sections contain respectively the qualifications of jurors, and exemptions from serving on them.

[On the prayer of every alien indicted for felony or misdemeanour, the proper officer, at the command of the court, must return for one half of the jury a competent number of aliens, if so many be in the town or place where the trial is had; and if not, then so many aliens as shall be found there, if any; and no such alien jurors shall be challenged

for want of any qualification, but may be, for any other lawful cause. Such a mixed jury is called a jury *de medietate linguæ*. So considerately just is our law, in the case of foreigners accused of offending against it.*

[* In the case of *Reg.* v. *Maria Manning*, 2 Carr. & K. 887, who with her husband was tried, convicted, and executed in the year 1849, for an appalling murder, it was held by the Court of Criminal Appeal, that though an alien, she was, by her marriage with a British subject, to be deemed and taken to be herself naturalised, and entitled to have all the rights and privileges of a natural born subject. Her claim for a jury *de medietate linguæ*, as an alien born, was therefore disallowed.]

CHAPTER LX.

CRIMES.

[4 Bla. Com. 2—8.]

[We have at length reached the last great, and a gloomy, department of English jurisprudence, that concerned with crime: and here again may be seen, to use the language of Plowden, adopted by Lord Coke, the "*amending hand*" even yet in full activity. Within the last very few years, such alterations have been effected in our criminal law, as to rescue it from almost all the odium to which it has been so long, and by no means unjustly, exposed. The two leading features of the recent reforms, are the causing criminal trials to be on the substantial — the real and intrinsic—merits, as in civil cases, in justice alike to the accused, and the public; and the establishment of a court of Criminal Appeal, invested with large powers, effectively guarded against abuse, by vesting in the judge the power of reserving a question of real difficulty or doubt, in point of law, arising at the trial, for the determination of that tribunal. From the pleadings and evidence, but especially the former, have been detached the pernicious subtleties and technicalities with which, till very recently, they had been deeply encrusted. Not only is the indictment shortened and simplified, but ample powers of amendment at the trial are given, limited only by a due consideration for the interests

of the accused, in order that he may not be prejudiced in his defence, on the merits. Offences of different classes but often provable substantially by the same evidence, may now be included in the same indictment, and also charged against either one or several defendants, who may be jointly or severally convicted of all, or any of such offences. Several accessories to a felony, or receivers of stolen property, if in custody, may be charged with substantive felonies, though the principal felon be not included in the same indictment, or be not in custody, or even amenable to justice. Again,—on an indictment for a felony or misdemeanour, the jury may convict of the attempt to commit it, if the evidence should warrant their doing so, and require an acquittal of the offence charged. If a person be indicted for a misdemeanour, and on the evidence the offence turn out to be a felony, the judge may discharge the jury, and order the prisoner to be indicted for the felony, or the jury may still find him guilty of the misdemeanour.

[By means of these and other improvements, which might be specified, and some of which will be presently noticed, the risk of justice being defeated, is greatly diminished, and judges and juries, are relieved from needless trouble and anxiety, without in the slightest degree prejudicing the prisoner, by depriving him of any safeguard to which he is fairly entitled. On the contrary, scrupulous care has been taken to prevent his being prejudiced before the jury, if charged with an offence after previous convictions. Moreover, the sanguinary severity of our criminal code, has been mitigated to an extent which may be appreciated, on adverting to the evidence afforded by Blackstone, that in his day, "to steal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, was made *capital!*"* "It is a melancholy truth," he says elsewhere,† "that among the variety of actions which men are daily

* 4 Com. 16. † Id. pp. 18, 19.

liable to commit, no fewer than *one hundred and sixty* have been declared by act of parliament to be worthy of instant death! So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty, or mitigate the nature of the offence: and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer:—he boldly engages in some desperate attempt to relieve his wants, or supply his vices; and if, unexpectedly, the hand of justice overtake him, he deems himself peculiarly unfortunate, in falling, at last, a sacrifice to those laws, which long impunity had taught him to contemn." After reading, and reflecting on, a description of such mournful truth and force, and sentiments which reflect lustre on the memory of the commentator, we may well felicitate ourselves on living in days of such enlightened humanity as the present, (when practically, but one offence, that of murder, is punished with death) and the disappearance of most, if not all, the evils which he enumerates.]

The knowledge of that branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it the adequate and necessary penalty, is of the utmost importance to every individual in the state. For, as a very great master * of the crown law has observed, solemnly, upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other, be deeply interested in these researches. [But a higher authority, the inspired Apostle has said, *Let him that thinketh he standeth, take heed lest he fall.* †] The infirmities of the best

* Sir Michael Foster. † Corinth. x. 12.

among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us, upon a moment's reflection, that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

A crime, or misdemeanour, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanours" only. [The true practical distinction is, between felonies and misdemeanours, both of which are "offences."*]

The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here the right of an individual, only, is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since besides the injury done to individuals, they strike at the very being

* Ante, p. 92, (n), and see West's Symbol.

of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

[It is well observed by Mr. Justice Coleridge, that it is not easy in theory, and quite impossible, according to the English law, to lay down any single principle by which to distinguish crimes from civil injuries—public from private wrongs. In theory, every wilful violation of another's right, however committed, and to whatever extent, is a crime, and so a public wrong. The distinction, which seems, in our law, almost wholly technical, depends, sometimes on the situation of the agent; sometimes on the nature or relations of the thing which is the object of the act; sometimes on the nature in which the act is done; sometimes the consequences of the act, the time of doing it, and other grounds, which are to be learned thoroughly only by an acquaintance with the law itself. This will explain why much of Blackstone's reasonings is necessarily unsatisfactory; because it is an attempt to explain upon one principle, what has been founded on many.]

In all cases, the crime includes an injury. Every public offence is also a private wrong, and somewhat more; it affects the individual, and likewise the community. Thus, robbery is an injury to private property; but were that all, a civil satisfaction in damages might atone for it: the public mischief is the thing for the prevention of which our laws have made it a serious [and when accompanied with stabbing, cutting, or wounding, a capital *] offence. In such atrocious injuries, the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life [liberty,] and property, it was impossible [till very recently] afterwards to make any reparation for the private wrong; which can be

* Stat. 7 Will. 4, and 1 Vict. c. 87, § 2.

had only from the body [lands] or goods of the aggressor. There are, however, crimes of an inferior nature, in which the public punishment is not so severe, but affords room for a private compensation also. For instance; in the case of battery, or beating another, the aggressor may be indicted for this, at the suit of the queen, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy, by action of trespass, for the injury which he in particular sustains, and recover a civil satisfaction in damages. [The important distinction between Felony and Misdemeanor, with reference to the right of private redress by civil proceedings is this: that the civil remedy is, in misdemeanor, not suspended; but, is in all cases, by a felony, where the act complained of, which would otherwise have given a right of action, is a felonious act: * and this, on the principle that the injured party ought first to fulfil his duty to the public, by prosecuting for the public offence.† After conviction and punishment, or even an acquittal, for stealing, the offender remains liable to an action for damages, at the suit of the prosecutor. And here must be noticed a great and beneficial change in the law of England, introduced in the year 1846. Till then, this anomaly existed: that if a person survived a grievous bodily injury, he might bring an action for damages against the wrong-doer; but if that injury had been so grievous as to cause death, then he who had occasioned it escaped all civil liability, as there was no one to sue for it: the rule of law being, *actio personalis moritur cum personâ.* But in that year, this rule gave way to stat. 9 & 10 Vict. c. 93; which cannot so properly be said to have created any new right, as to have revived one that had died at common law. This statute enacts, that whensoever the death of a person shall be caused by such wrongful *act*, *neglect*, or *default*, as would have entitled, if

* Per Tindal, C.J., *Marsh* v. *Keating*, 1 Bing, N.C. 217.

† Per Lord Ellenborough, C. J., *Crosby* v. *Leng*, 12 East. 413.

death had not ensued, the party injured to maintain an action and recover damages in respect thereof; the person, whether an individual or a body corporate, who would have been liable to such action, shall be liable to an action for damages at the suit of the personal representative of the deceased, notwithstanding the death, and though it shall have been caused under such circumstances as *amount in law to felony.* Only one action can be brought, and that within twelve calendar months after the death; and for the benefit of the wife, husband, parent and child of the deceased: the words parent and child including father, mother, grandfather, grandmother, stepfather and stepmother; son, daughter, grandson, granddaughter, stepson and stepdaughter. The damages must be measured altogether by the pecuniary* loss actually sustained and proved; and be divided among those entitled, in such shares as the jury shall direct by their verdict. The comprehensive language of this statute appears to embrace the highest class of felonious homicide,—even murder itself, as well as manslaughter. Previously to the Act, the common law allowed the injured person, after either a conviction, or a *bonâ fide* acquittal of the wrong-doer not obtained by collusion, to sue him for damages in respect of a felonious assault, as by stabbing;† and this statute has vested such a right in the personal representative of the slain person,—at all events after an acquittal. Where, however, there has been a conviction, the law of *forfeiture* may materially interfere with the realisation of the fruits of the verdict, with respect to property possessed by the defendant at the time of the felony: but not with respect to property acquired subsequently to a pardon, or endurance of the punishment. As far as concerns any remedy against the *person,* it may be in the custody of the law for a lengthened period.]

* Per Pollock, C. B., *Gillard* v. *Lancast. and York R. Co.*, Legal Observer, xxxvii. p. 215.

† Per Lord Ellenborough, C. J., *Crosby* v. *Leng,* 12 East. 409.

CHAPTER LXI.

EXCUSES FOR THE COMMISSION OF A CRIME.

[4 Bla. Com. 20—33.]

ALL the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, *the want, or defect, of will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognisable by human laws, there must be both a will and an act. For though, *in foro conscientiæ*, a fixed design or will to do an unlawful act, is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions,* it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no

* Ante, p. 95.

civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a *defect of understanding*. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else than a determination of one's choice to do, or to abstain from, a particular action: he, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party, but not called forth and exerted at the time of the action done; *which is the case of all offences committed by chance, or ignorance*. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is *constrained by some outward force and violence*. Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.

I. First, we will consider the case of *infancy*, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing

a bridge or a highway, and other similar offences: for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one. [The criminal liabilities of infants have been already sufficiently noticed in a preceding chapter.*]

The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or lunatic. [*Actus non facit reum, nisi mens sit rea:* i.e., the act itself does not make a man guilty, unless his *intention* were so. The very essence of crime consists in intention. "It is a principle of natural justice, and of our law," says Lord Kenyon, "that the intent and the act must concur to constitute crime." †] The rule of law is, *furiosus furore solum punitur,* i.e., a madman is punished only by his madness. In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man, in his sound memory, commit a capital offence, and before arraignment for it he become mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced: and if, after judgment, he become of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have

* Ante, p. 350—2. Chap. XXXVIII. † *Fowler* v. *Padget,* 7 T. Rep. 514.

alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry VIII., a statute was made, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edward Coke, the execution of an offender is for example: [in the language of Cicero,] "*ut pœna ad paucos, metus ad omnes perveniat*: but so it is not, when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." If there be any doubt whether the party be *compos* or not, this shall be tried by a jury. And if he be found *non compos*, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the queen's subjects. [And therefore, by several statutes, their apprehension and confinement are provided for.*

[The jury ought to be told, in all cases where the defence of a prisoner is insanity, that *every man is presumed to be sane*, and to possess a sufficient degree of reason to be responsible for his crimes; until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act in question, the party accused

* See stats. 39 & 40 Geo. III. c. 94, in cases of treason, murder, and felony, and 3 & 4 Vict. c. 54., § 3, in cases of misdemeanor.

was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong. The law is administered on the principle that every body must be taken conclusively to know it, without proof that he does. If the accused were conscious that the act was one which he ought not to do, and if that act were, at the same time, contrary to the law of the land, he is punishable. The usual and correct course, therefore, is, to leave the question to the jury,—Whether the party accused had a *sufficient degree of reason to know that he was doing an act that was wrong?* In the case of a person labouring under partial delusions only, and not otherwise insane, notwithstanding he did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing it, that he was acting contrary to the law of the land.—Such is the safe and sound rule laid down by the assembled judges of the land, in answer to questions proposed to them, a few years ago, by the house of lords, in consequence of public feeling being outraged by the acquittal, on the ground of insane delusion, of a man for a deliberate act of assassination.* It was about that time a favourite notion with some speculative medical gentlemen, that "if a man should have been led to the perpetration of the guilty act, by an uncontrollable impulse whether accompanied by deliberation or not, he would be entitled to an acquittal, as an irresponsible agent." This dangerous and monstrous doctrine, of the co-existence of *moral insanity* with *intellectual sanity*, which strikes at the root of personal safety in society, is utterly repudiated in our courts of justice. The present Lord Chancellor (Lord

* This was the case of Daniel M'Naughten, who shot Mr. Drummond, in the year 1843. See 1 *Carr & K.* 129, and Warren's Miscellanies, vol. ii.

Cranworth) in trying, when Baron Rolfe, a boy twelve years old, for the deliberate and cunning poisoning of his aged grandfather, thus annihilated such mischievous and absurd fallacies, when they were put forth in defence of the prisoner. "The witnesses called for the defence, had described the prisoner as acting from 'uncontrollable impulse.' Such evidence may tend to the perfect justification of every crime that can be committed. What is the meaning of not being able to resist moral influence? Every crime is committed under an influence of that description; and the object of the law is to compel persons to control those influences. If it be made an excuse for a person who has committed a crime, that he has been goaded into it by some impulse which medical men may choose to say he could not control, I must observe that such a doctrine is fraught with very great danger to society." The jury, guided by this enlightened direction, convicted the youthful murderer.]

Thirdly; as to artificial voluntarily-contracted madness, by drunkenness, or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour. A drunkard, says Sir Edward Coke, who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* A law of Pittacus enacted, that he who committed a crime when drunk, should receive a double punishment; one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law indeed made great allowances for this vice: *per vinum delapsis capitalis pœna remittitur.* But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus *to privilege one crime by another.*

[*Qui peccat ebrius, luat sobrius.* It is to be observed, however, that the fact of drunkenness is often very material,

to show the *intention* with which the particular act charged as an offence, was committed.]

A fourth deficiency of will, is where a man commits an unlawful act by misfortune or chance, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed, which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present observing only, that if any accidental mischief happen to follow from the performance of a *lawful* act, the party stands excused from all guilt; but if a man be doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse: for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

Fifthly: Ignorance, or mistake, is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of FACT, and not an error in point of LAW. As, if a man, intending to kill a thief or housebreaker in his own house, by mistake kill one of his own family, this is no criminal action: but if a man think he has a right to kill a person excommunicated, or outlawed, wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.

[There is no presumption in this country, said Mr. Justice Maule,* that every person knows the law: it would be

* *Martindale* v. *Falkner*, 2 C. B. 719, 726.

contrary to common sense and reason if it were so. A person *may* be ignorant of the law; but the rule is, that such ignorance shall not *excuse* him, or relieve him from the consequences of a crime, or from liability on a contract. There may be such a thing as a doubtful point of law: for if not, there would be no need of courts of appeal, the existence of which shows that even judges may be ignorant of law: and if so, it would be too much to hold that ordinary people are bound to know it. The rule in the text of Blackstone, subject to the above judicial qualification, may be received as a fundamental one; for otherwise, there is no knowing to what extent* the excuse of ignorance might not be carried. It would be urged in every case, and paralyse the arm of the law, in its attempt to deal with those who violate it. It is no defence on behalf of a foreigner, charged in England with having committed an offence against our law, that he did not know that he was doing wrong, the act not being an offence in his country.† In a case tried before Lord Eldon,‡ he told the jury that the prisoner was, in strict law, guilty within a certain statute, making penal the act with which he was charged, if the facts were proved, though he could not then know that the statute had passed: it having received the royal assent on the 10th May, 1799, and the act having been done off the coast of Africa, on the 27th of the the ensuing June. That great lawyer said, under these circumstances, that the prisoner's ignorance of the passing of the act, could in no otherwise affect the case, than that it might be the means of recommending him to a merciful consideration elsewhere, should he be found guilty. He was convicted, but pardoned.]

A sixth species of defect of will is that arising from *compulsion*, and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his

* Per Lord Ellenborough, *Bilbie* v. *Lumley*, 2 East, 469.

† *Rex* v. *Esop*, 7 C. & P. 456.

‡ *Bailey's Case*, Russell & Ry. C. C. 4.

judgment disapproves; and which, it is to be presumed, his will, if left to itself, would reject. As punishments are therefore inflicted only for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is *the obligation of civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt.* But, however that may be, obedience to the laws in being, is undoubtedly a sufficient extenuation of civil guilt before the civil tribunal. The sheriff who burnt Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations; † the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for felonious

* *Vide* Ante, p. 19. Chap. III.; where it is hoped the reader may see the topic treated, though briefly, with the caution due to its great importance.

† Ante Chap. XXXV., VI., VII., IX., pp. 319—353.

offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband, or even in his company, which the law construes a coercion, she is not guilty of any crime; being considered as acting by compulsion, and not of her own will; a doctrine at least a thousand years old, in this kingdom, being to be found among the laws of king Ina, the West Saxon. But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters), even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, the highest crime which a member of society can, as such, be guilty of, no plea of marriage shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt: as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay. And *in all cases*, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme-sole.

[The presumption that a wife acts under her husband's coercion, in committing a crime, may be rebutted by evidence to the contrary: and if it appear that she was not drawn into it by her husband, but the principal actor and inciter, she is equally guilty with him. It has been lately held, that a wife commits no criminal offence, and cannot be convicted as a receiver, though she receive goods from her husband, knowing that he

had stolen them; nor is she an accessory after the fact, in receiving her husband, after she knows he has committed a felony.* And though a wife cannot be found guilty of stealing her husband's property, yet if she commit adultery, and then, with her paramour, steal the goods, she is guilty: for she had determined her character of *wife*, and was no longer recognised as having any property in the goods.†]

Another species of compulsion or necessity is what our law calls *duress per minas;* or threats and menaces, which induce a fear of death, or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded, such *qui cadere possit in virum constantem, non timidum et meticulosum,* as Bracton expresses it, in the words of the civil law. ["What is the disclosure she makes?" inquired Lord Mansfield, in delivering his judgment, on an application of one Margaret Caroline Rudd to be pardoned, on having given evidence as an accomplice against the two brothers, Daniel and Robert Perreau, who were hanged for forgery. "That Daniel Perreau came with a knife to her throat, and threatened to kill her, if she did not forge one of the bonds in question: that under the terror of death she forged it; and that Robert Perreau brought the bond, before ready filled up. On this information, she is no accomplice; she has confessed no guilt, if the fact be true that she was under the fear of immediate death: for it is the WILL that constitutes a crime. She comes, therefore, in the character of a person injured, in the character of one to whom this violence has been done. Instead of being a party offending, she is a party OFFENDED, as much as a man who has been robbed on the highway."‡] In time of war or rebellion, a man may

* *Reg.* v. *Brooks*, 22 Law J., N. S., M. C. 12.

† *Reg.* v. *Fetherstone*, 23 Law J., N. S. 127 (M. C.).

‡ *Rex* v. *Rudd*, 1 Cowp. Rep., 337.

be justified in doing many treasonable acts, by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This however seems, only, or at least, principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and have no other possible means of escaping death, but by killing an *innocent person;* this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. But in such a case he is permitted to kill *the assailant;* for there the law of nature, and self-defence, its primary canon, have made him his own protector.

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, without which such obligation would be criminal. And that is when a man has his choice of two evils set before him, and being under a necessity of choosing one, chooses the less pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil, than in choosing the lesser. Of this sort is that necessity, where a man, by the commandment of the law, is bound to arrest another for any capital offence, or disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to.

There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food, or clothing, may justify stealing either, to relieve his present necessities? And this both Grotius and Puffendorf, together with many other of the foreign jurists *, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit confession of society, is revived. And some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present. And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero, who holds that *suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*; but also the Jewish law, as certified by king Solomon himself: *if a thief steal to satisfy his soul when he is hungry, he shall restore sevenfold, and shall give all the substance of his house;* which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason; for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor, by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger, is by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the

* And Archdeacon Paley, in his Moral Philosophy, (bk. ii. chx. i. *ad finem*), lays down a similar doctrine.

continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution.* Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider that the queen, on the representation of her ministers of justice, has power to soften the law, and to extend mercy in cases of peculiar hardship. This is an advantage wanting in many states, particularly those which are democratical; and these have, in its stead, introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution, thought it better to vest in the crown, the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

[If a man procure an offence to be done by an innocent agent, the former only is held guilty. If an idiot be incited to commit murder, the inciter is guilty of murder, as principal in the first degree, though not present when the offence was committed.†]

To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extend as well to the will, as to the other qualities of his mind. I mean the case of the sovereign; who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would have been the consequence if the sovereign were

* Ante, pp. 367—381. Chap. XI.

† 1 Hale, 617, and see per Erle, J., *Reg.* v. *Bleasdale*, 2 C. & K. 765.

to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. [It is quaintly said, *arguendo*, in *Willion* v. *Berkley*, Plowden, 247, "And if the king kill a man, there is no remedy in the law, and yet it is not well done."]

CHAPTER LXII.

HIGH TREASON, AND MISPRISION OF TREASON.

[4 Bla. Com. 332.]

[DOWN to the year 1828, the law distinguished between High Treason and Petit Treason: the latter consisting, according to statute 25 Edw. III. stat. 5, c. 2, in a servant killing his master, or mistress, or his master's wife; a wife her husband; or an ecclesiastical person his superior. In all these cases, there was a relation between the offender and the victim, involving confidence, faith, and obedience, violated by the offence; and such a prisoner was tried and punished, as in cases of high treason. In the year above mentioned, however, by statute 9 Geo. IV. c. 31, § 2, it was enacted, that every offence which before then would have amounted to petit treason, should be deemed to be murder only, and no greater offence; and all persons guilty of it, as principals or accessories, should be dealt with, indicted, tried, and punished, as principals and accessories in murder. There is, therefore, no longer any legal significance in the formerly correlative term * "*High* Treason"; since nothing exists to which it is contra-distinguished in the law. But as the expression has been for so many ages known to the law, and is still frequently used by the legislature: as in

* 4 Steph. Com. 215, n. (*b*).

statute 3 & 4 Vict. c. 52, referred to in a former chapter,* where the aiding and abetting the marriage of the infant king or queen, there prohibited, is declared 'high treason;' and also in stat. 17 & 18 Vict. c. 26, (which will be presently noticed), it is deemed right here to retain it.]

Treason, *proditio*, in its very name, which is borrowed from the French, *trahir*, imports a betraying, treachery, or breach of faith. It is a general appellation, made use of by the law. to denote treachery against the sovereign or liege lord. When disloyalty so raises its crest as to attack even majesty itself, it is called, by way of eminent distinction, HIGH TREASON (*alta proditio*); being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil denominates it, also, in our English law.

As this is the highest civil crime, which, considered as a member of the community, any man can possibly commit, it ought therefore, to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone, says the president Montesquieu, is sufficient to make any government degenerate into arbitrary power. And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of *constructive treasons:* that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power, a very uncertain charge, was, in the 21 Edw. III., held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he had paid him 90*l.*: a crime it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even

* Ante, p. 208, Chap. XIV.

his messenger, has also fallen under the same denomination. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the *ministers* of the prince, shall be treason. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. stat. 5, c. 2 was made: which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the ancient laws that had before been enacted to punish transgressors against the state.

[Under this statute there are five existing branches of high treason. *First*: "When a man doth compass, or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir;" a queen regnant being within the wording of the act. The words "*compass or imagine*" are synonymous terms, signifying the purpose, or design, of the mind, or will, and not the carrying such design into effect. As this, however, is an act of the mind, it cannot possibly fall under any judicial cognisance, unless demonstrated by some open or *overt* act, the statute expressly requiring the accused to "be thereof, upon sufficient proof, attainted of some *open act*, by men of his own condition." Spoken words, though as wicked as may be, amount only to a high misdemeanor, and not high treason. But *writing* them is an overt act of high treason, arguing deliberate intention: *scribere est agere*. *Secondly*: "If a man do violate the king's companion (i.e. wife), or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir": the plain intention being, to guard the blood royal from taint of illegitimacy, whereby the succession to the crown might be rendered dubious. *Thirdly*: "If a man do levy war against our lord the king, in his realm": which may be, by *taking arms*, actually to dethrone the king, but

under pretence to reform religion or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. The test here is, the universality of the design; which makes it a rebellion against the state, an usurpation of the forms of government, and an evident invasion of the king's authority. *Fourthly*: "If a man be adherent to the king's enemies, in his realm, gives to them aid, or comfort, in the realm, or elsewhere": as by giving them intelligence, sending them provisions, selling them arms, treacherously surrendering them a fortress, or the like. *Fifthly*: "If a man *slay* the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices in assise, and all other justices assigned to hear and determine, being in their places, doing their offices." Thus has stood the law for upwards of five centuries; the statute having been passed in the year 1351.

[Misprision of Treason consists of the bare knowledge and concealment of high treason, without any degree of assent thereto; for any assent makes the party a principal traitor, as indeed the concealment, which was converted into aiding and abetting, did at common law. But the statute 1 & 2 Ph. & M. c. 10, enacts that a *bare concealment* of treason, shall be held only a misdemeanor.

[Two recent acts, called forth by the circumstances of the times, and which it is hoped may never again have to be called into action, are, stat. 5 & 6 Vict. c. 51, passed in the year 1842, entitled "An Act for providing for the further Security and Protection of Her Majesty's person"; and stat. 11 & 12 Vict. c. 12 (A.D. 1848), entitled "An Act for the better security of the Crown and Government of the United Kingdom": constituting divers acts of a treasonable character felonies, punishable with transportation or imprisonment. The indictment is to be valid, though the facts may amount to treason; and nothing in the Act is to affect the statute 25 Edw. III. c. 2.

[The offence of high treason must be prosecuted, if at all, within three years after the commission of the offence, except in the case of a designed assassination of the sovereign; and no person shall be tried for high treason or misprision of treason, but on the oath of two witnesses, unless he, willingly and without violence, confess in open court. One witness suffices, however, under stat. 5 & 6 Vict. c. 51, in case of an attempt to injure the person of the queen.

[The legislature (stat. 7 Ann. c. 21) has anxiously provided for giving one accused of this enormous offence, or the kindred one of *misprision* of treason, every reasonable means of securing a fair trial, by giving him, ten days before the trial, a list of the witnesses and jury, mentioning their names, professions, and places of abode; and at the same time that a copy of the indictment is delivered to him. This Act was, in the year 1854, extended to Ireland, by stat. 17 & 18 Vict. c. 26.

[This enumeration of the different heads of high treason may be well followed by the impressive explanation of its heinousness, by the late Chief Justice Tindal, on a memorable occasion.*

["The crime of high treason, in its own direct consequences, is calculated to produce the most malignant effects upon the community at large. Its direct and immediate tendency is, the putting down the authority of the law; the shaking and subverting the foundation of all government; the loosening and dissolving the bands and cement by which society is held together; the general confusion of property; the involving a whole people in bloodshed, and national destruction: and, accordingly, the crime of high treason has always been regarded by the law of this country as the offence, of all others, of the deepest dye, and as calling for the severest means of punishment. But in the very same proportion as it is dangerous to the community and fearful

* *Reg.* v. *Frost*, December, 1839.

to the offender, from the weight of punishment which is attached to him, has it been thought necessary, by the wisdom of our ancestors, to define and limit the law within certain express boundaries; in order that, on the one hand, no guilty person might escape the punishment due to his transgression, by an affected ignorance of the law; and, on the other, that no innocent man might be entangled, or brought unaware, within the reach of its severity, by reason of the law's uncertainty."]

The punishment of high treason is solemn and terrible. [As will be seen in an ensuing chapter, but far less appalling and revolting than in the time of Blackstone.]

CHAPTER LXIII.

FELONY AND MISDEMEANOR.

[4 Bla. Com. 94—97.]

FELONY, in the general acceptation of our English law, comprises every species of crime, which occasioned, at common law, the *forfeiture of lands and goods*. This most frequently happens in those crimes, for which a capital punishment either is, or was, liable to be inflicted. Treason itself, says Sir Edward Coke, was anciently comprised under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edward III., c. 2, speaking of some dubious crimes, directs a reference to parliament; that it may be there adjudged, "whether they be treason, or *other* felony." All treasons, therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are, in some degree or other, felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead, manslaughter, and larceny:* all which are, strictly speaking, felonies, as they subject the committers of them to forfeitures. So that upon the whole, the only

* Till the year 1827 there was a distinction between Grand and Petty Larceny, which was then abolished, by stat. 7 & 8 Geo. IV. c. 29, § 2. Now, whatever be the value of the property stolen, it is Larceny.

adequate definition of felony seems to be that which is before laid down; viz., an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word felony, or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled juridical lexicographers: some deriving it from the Greek φηλος, an impostor or deceiver; others from the Latin, *fallo fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology; that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it: in which language indeed, as the word is clearly of feudal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words: **fee**, which signifies, as we well know, the fief, feud, or beneficiary estate; and **lon**, which signifies price or value. Felony is, therefore, the same as *pretium feudi*,—the consideration for which a man gives up his fief; as we say in common speech, such an act is "*as much as your life*," or estate "*is worth;*" in this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and by a small deflection from the original sense, such as induced the forfeiture of goods also) were

denominated "*felonies.*" Thus it was said, that suicide and robbery were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term felony, *the actual crime* committed, and not the penal consequence. And upon this system only can we account for the cause why treason in ancient times was held to be a species of felony: viz., because it induced a forfeiture. [In short, the true criterion of felony, is forfeiture; and accordingly, to this day, all felonies punishable with death, occasion a forfeiture, to a greater or less extent, of the *lands* of the offender; and the total forfeiture of his goods and chattels; and even such felonies as are not capitally punishable, occasion the total forfeiture of the convicted person's goods and chattels.* In misdemeanors, there is no forfeiture, nor are there any accessories; all being principals.

[Felonies and misdemeanors are the creatures of both common, and statute law: the latter, in modern times, having been very active in declaring, and that often somewhat arbitrarily, what acts shall or shall not be referred to the one or the other category. To obtain, for instance, ten thousand pounds' worth of goods or money, by the grossest false pretence, is declared a misdemeanor only; to steal a farthing, a felony. Similar punishment, moreover, may be inflicted in both classes of offence: except that a fine can be imposed in misdemeanor only: since on a conviction for felony, there is, through the forfeiture, nothing left to satisfy the fine. The subjects of both classes of offences, consist chiefly of injuries, by malice, force, or fraud, to character, person, or property. Threatening to publish a libel, for instance, with an intention to extort money, or property, or obtain an office or a situation, is a misdemeanor, punishable with fine, imprisonment, and hard labour; but threatening to accuse of certain *crimes*, with such an

* 4 Steph. Com. 88.

intention, is felony, punishable with even transportation for life. The legislature seems latterly to have become sensible of the frequently shadowy nature of the distinction, in at least a technical point of view, between a felony and a misdemeanor; and has endeavoured to avert a failure of justice on that account, in the way pointed out in a former chapter: namely, that if it appear, on the trial of a person for a misdemeanor, that the facts amount, in law, to felony, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor: and he shall not be liable to be prosecuted, afterwards, for felony, on the same facts, unless the judge think fit, in his discretion, to discharge the jury from giving a verdict, and direct the prisoner to be tried for the felony:" an enactment aimed at the removal of difficulties arising out of the doctrine that a misdemeanor was merged in the felony.* Before the passing of the act here referred to, there was no power, in an indictment for felony, to find a verdict for anything less than a felony, or in an indictment for a misdemeanor, to find a verdict for an attempt to commit one. The jury are now, however, empowered, if they see that the prisoner did not complete the offence, in an indictment for felony or misdemeanor, to convict respectively of an attempt to commit either offence; finding him not guilty, however, of the felony or misdemeanor.†

[An attempt to commit either a felony or misdemeanor, whether either be created by statute or common law, is itself, generally speaking. a misdemeanor, punishable accordingly; but attempts to commit certain felonies are declared *felonies*, and punishable with transportation for fifteen years: as under stat 9 & 10 Vict. c. 25, § 7, in the case of maliciously attempting to set fire to buildings, vessels, mines, stacks, or vegetable produce.

* Stat. 14 & 15 Vict. c. 100, § 12. † *Id.* § 9.

CHAPTER LXIV.

HOMICIDE.

[4 Bla. Com. 177—201.]

Of crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator, and of which, therefore, no man can be entitled to deprive himself; or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature, or revelation. The subject, therefore, of the present section, will be the offence of HOMICIDE, or destroying the life of man: in the several stages of guilt, arising from the particular circumstances of attendant mitigation, or aggravation.

Homicide, or the killing of any human creature, is of three kinds: justifiable, excusable, or felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing. [There is no longer, in point of law, any practical distinction between justifiable and excusable homicide; since in the year 1828, it was enacted by statute, 9 Geo. IV., c. 31, § 10, "that no *punishment* or *forfeiture* shall be incurred by any person who shall kill another by misfortune, or in his own defence, or

in *any other* manner, *without felony.*" The only distinction now is, between homicide, guilty, or guiltless,—felonious, or not, and consequently punishable or dispunishable. As it is, however, of the highest importance to know to which of these two categories a particular case of homicide is referable,—and the latter of them involves the ancient distinction between justifiable and excusable,—it is considered proper not to disturb the order in which the commentator discusses these matters.]

Justifiable homicide is of divers kinds:—

i. Such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must REQUIRE it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted, or outlawed, deliberately, uncompelled, and extrajudicially, is murder. For as Bracton justly observes, *istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.* And farther, if judgment of death be given by a judge not authorised by lawful commission, and execution be done accordingly, the judge is guilty of murder. And upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the *Common pleas* under Cromwell's government (since it is necessary to decide the disputes of civil property, in the worst of times), yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission: a distinction perhaps rather too refined; since

the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also, such judgment, when legal, must be executed by the proper officer, or his appointed deputy: for no one else is REQUIRED by law to do it, which requisition it is that justifies the homicide. If another person do it of his own head, it is held to be murder: even though it be the judge himself. It must farther be executed, *servato juris ordine*; it must pursue the sentence of the court. If an officer behead one who is adjudged to be hanged, or *vice versâ*, it is murder: for he is merely ministerial, and therefore justified only when he acts under the authority and compulsion of the law: but if a sheriff change one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide; and besides, this licence might occasion a very gross abuse of his power. The queen indeed may remit part of a sentence; as, in the case of high treason, all but the beheading; but this is no change, no introduction of a new punishment: and in the case of felony, where the judgment is to be hanged, the queen, it has been said, cannot legally order even a peer to be beheaded.

Again; in some cases homicide is justifiable, rather by the permission, than by the absolute command, of the law, either for the *advancement of public justice*, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the *prevention of some atrocious crime*, which cannot otherwise be avoided.

Homicide, committed for the advancement of public justice is: 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, [or his assistant], in the due execution of his office, in either a civil or criminal case, arrests, or attempts to arrest, one who resists, and, in the endeavour to take him, kills him. [But a constable cannot

kill or shoot at a man when in the act of committing what is a misdemeanor, being a first offence, but really a felony in the particular case, by reason of previous convictions, which were, however, unknown to the constable.* Nor can a private person who has arrested, on suspicion of felony, an innocent person, who breaks away from him, kill him, though he cannot be otherwise taken; for he is not bound to take notice of the authority which, in such a case, the law gives to a private person.†] 3. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are, in case of ABSOLUTE NECESSITY, justifiable in killing them. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape.[r] But in all these cases there must be an apparent necessity on the officer's side; viz., that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. [It must be no ordinary emergency that will warrant the use of fatal force.]

In the next place, such homicide as is committed for the prevention of any *forcible and atrocious crime*, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared, in statute 24 Hen. VIII. c. 5. If any person attempt a robbery or murder of another, or attempt to break open a house, in the *night time*, (which extends also to an attempt to burn it,) and shall be killed in such attempt,[s] the slayer[t] shall be acquitted[u] and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the *day time*, unless it carry with it an attempt

* *Reg.* v. *Dadson*, 20 Law J. (Mag. Cas.) 57.
† 2 Hale, P. C. 83.

of robbery also. So the Jewish law, which punished no theft with death, makes homicide justifiable in case of only nocturnal house-breaking: "If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him; but if the sun be risen upon him, there shall blood be shed for him: for he should have made full restitution."* [A woman is justified in killing a man attempting to violate her chastity, and a husband or father one who is attempting that horrible outrage on his wife or daughter; but not if there be, however criminal, consent.]

In these instances of justifiable homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.†

ii. Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

Homicide *per infortunium*, or misadventure, is where a man doing *a lawful act*, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person [without being guilty of negligence] is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceed the

* Exod. xxii. 2.

† *Vide* ante, p. 603, 4.

bounds of moderation, in either the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at least, and in some cases, according to the circumstances, murder; for the act of immoderate correction is unlawful.

[If death ensue, in an innocent and allowable sport and recreation, or manly exercises tending to give strength, activity, and skill in the use of arms, and entered into merely as private amusements among friends—as boxing, cudgels, foils, or wrestling,—as these are lawful, it falls within the rules of excusable homicide; but if the sport be unlawful in itself, or productive of danger, riot, or disorder, so as to endanger the peace—as a prize fight—and death ensue, it is manslaughter.*]

Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a tresspass, and at best a piece of idleness, of inevitably dangerous consequence.

Homicide in self-defence, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of forcible and atrocious crime; which is not only a matter of excuse, but of justification. But the self-defence of which we are now speaking, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him; in which latter case the law presumes both in some degree of fault, but for which the survivor can no longer be punished. And this is *one*† instance of what the law expresses by the word chance-medley, or, as some rather choose to write it, *chaud-medley*, the former of which, in its etymology, signifies a casual affray, the latter an

* East's Pleas of Cr. Ch. V. § 41. † 4 Steph. Com. 127.

affray in the heat of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any matter of homicide by misadventure; whereas it appears by the stat. 24 Hen. VIII., c. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. This right of natural defence does not imply a right of *attacking*; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or, at least, probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper, legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently and safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no

such point of honour: because the queen and her courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. The party assaulted must therefore flee as far as he conveniently can, till prevented by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his own defence, he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law.

And as the manner of the defence, so is also the time to be considered; for if the person assaulted do not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel,* and A give the first onset, and B retreat as far as he safely can, and then kill A, this is murder; because of the previous malice and concerted design. But if A, upon a sudden quarrel, assault B first, and upon B's returning the assault, A really and *bona fide* flee; and being driven to the wall, turn again upon B, and kill him: this may be *se defendendo* according to some of our writers; though others have thought this opinion too favourable, inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended: therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting, being construed as the act of the party himself.

* It is a very high misdememeanor to send a challenge to fight a duel—that is, to commit murder. The heinousness of the offence may be seen well stated by Mr. Justice Grose in *Rex* v. *Rice*, 3 East, 581.

There is one species of homicide *se defendendo*, where the party slain is equally innocent with him who occasions his death: and yet this homicide is also excusable* from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

FELONIOUS homicide, is an act of a very different nature from the former; being the killing of a human creature, of any age, or either sex, without justification, or excuse. This may be done by killing either one's self, or another man.

Self-murder, the pretended heroism, but real cowardice, of the Stoic Philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law,† yet was punished by the Athenian law with cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers, that no man has a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offence: one spiritual, in evading the prerogative of the Almighty, and rushing into His immediate presence uncalled for; the other temporal, against the

* Mr. Sergeant Stephen, in accordance with Hawkins (P. C. Bk. c. 28, § 26), regards this as a *justifiable* homicide, for the reason assigned in the text as merely *excusing it*. See 4 Stephen's Com. 125 n. (*h*).

† *Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*—Ff. 49, 16, 6.

queen, who has an interest in the preservation of all her subjects; the law has therefore ranked this amongst the highest crimes, making it a peculiar species of felony, a felony committed on one's self. [One who successfully counsels and incites another to commit suicide, is liable to be tried, convicted, and punished in all respects as a principal felon, and equally whether he were or were not present at the time of death: for by a recent statute,* any accessory before the fact, to *any* felony, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.] A *felo de se*, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as, if attempting to kill another, he run upon his antagonist's sword, or shooting at another, the gun burst and kill himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law rationally judges, that every melancholy and hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter,† to form a legal excuse. And therefore if a real lunatic kill himself, in a lucid interval, he is a *felo de se* as much as another man.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can act only upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial; on the latter, by a forfeiture,

* Stat. 11 & 12 Vict. c. 46, § 1.

† Ante, Chap. LXI.

from the moment of the act of suicide, of all his goods and chattels to the queen; hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. [Till the year 1823, the body of a *felo de se* was buried in a cross-road, at night time, with a stake run through it. In that year, however, stat. 4 Geo. IV. c. 52, § 1. directed the remains of such a person to be buried privately in the church-yard, or other burying-ground, between the hours of nine and twelve o'clock at night, but without the performance of any of the rites of Christian burial: which last, indeed, was already prohibited by the prayer-book, for any that have '*laid violent hands* upon themselves.

[The court of exchequer chamber, in the year 1846, was occupied with a very interesting case,* in which the arguments and judgment turned on the signification of the words "commit suicide," used in a policy of life insurance. It was held, that they included *all acts of voluntary self-destruction*—that is, the intentional act of a person knowing the probable consequences of what he was doing: it being immaterial whether he was, or was not, at the time, a *responsible moral agent*,—whether he were sane or not. It was also held that the words had not a technical meaning, nor imported felony. The etymology of the word was made the subject of much learned discussion and research; and the passage in the text was often referred to.

[An eminent living divine, and logician,† writes thus, justly and forcibly on this subject: "When a Christian moralist is called on for a direct *scriptural* precept against suicide, instead of replying that the bible is not meant for a complete code of *laws*, but for a system of motives and principles, the answer frequently given is, 'Thou shalt do

* *Clift* v. *Schwabe*, 3 C. B. 437.

† Archbishop Whately. Elements of Logic, Chap. III. § 5 (*n.*)

no *murder;*' and it is assumed in the arguments drawn from reason, as well as in those from revelation, that suicide is a species of murder—namely, because it is *called* 'self-murder:' and thus, deluded by a name, many are led to rest on an unsound argument, which like all other fallacies, does more harm than good, in the end, to the cause of truth. Suicide, if any one consider the nature, and not the name of it, evidently wants the most essential characteristic of murder, viz.: the hurt and injury done *to one's neighbour*, in depriving him of life, as well as to others, by the insecurity they are, in consequence, liable to feel. And hence, as no one can, strictly speaking, do *injustice* to himself, he cannot, in the literal and primary acceptation of the words, be said either to *rob* or *murder* himself. He who deserts the post to which he is appointed by his Great Master, and presumptuously cuts short the state of probation graciously allowed him for working out his salvation, whether by action, or patient endurance, is guilty, indeed, of a grievous sin, but of one not the least analogous, in its character, to *murder*. It implies no inhumanity. It is much more closely allied to the sin of wasting life in indolence, or in trifling pursuits—that life which is bestowed as a seed-time for the harvest of immortality. What is called, in familiar phrase, 'killing time,' is in truth, an approach, as far as it goes, to the destruction of one's own life: for 'Time is the stuff life is made of.'"]

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offence into *Manslaughter*, and *Murder*. The difference between these, may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this: that manslaughter, when voluntary, arises from the sudden heat of the passions: murder, from the wickedness of the heart.

1. Manslaughter is therefore thus defined: the unlawful killing of another, without *malice* either express or implied:

which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions *homicidia vulgaria: quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu.* And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation; but there may be accessories after.

As to the first, or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kill the other, this is manslaughter: and so it is, if, upon such an occasion, they go out to fight in a field: for this is *one continued act of passion;* and the law pays such a regard to human frailty, as not to put a hasty, and a deliberate, act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kill the aggressor, though this be not excusable *se defendendo,* since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. In this, however, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside, and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.

Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo,* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor: in the other no necessity at all, being only a *sudden* act of *revenge.*

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them

kill the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no *intent* to do the other any personal mischief. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or a piece of timber into the street and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he call out to all people to have a care, it is misadventure only; but if it were in London, or any other populous town, where people are continually passing, it is manslaughter, though he give loud warning; and murder, if he know of their passing, and give no warning at all, for then it is malice against all mankind. [It may be received as a general rule, that whenever a person is employed in the discharge of any duty whence danger may arise to others, his neglect *of ordinary* precaution or careless, or grossly unskilful discharge of such duties, if occasioning death, will be manslaughter; but it must be an act of personal misconduct, to entail criminal responsibility.] In general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tend to bloodshed, it will be murder; but, if no more was intended than a mere civil trespass, it will amount only to manslaughter.

Next, as to the punishment of this degree of homicide. The crime of manslaughter amounts to felony, and the offender is liable, in the discretion of the court, on conviction, to be transported for life, or kept in penal servitude; or imprisoned, with or without hard labour, for any term not exceeding four years, or to pay a fine.* And besides

* Stat. 9 Geo. IV. c. 31, § 9; 16 & 17 Vict. c. 99.

this, as we have seen,* by a late act,† introducing an entirely novel principle into our laws, one guilty of manslaughter, or even murder, may be sued by the representative of the deceased, in an action for damages, for the benefit of the wife, husband, parent, and child of the deceased, proportioned to the *pecuniary* injury resulting from the death, to be divided among the parties in such shares as the jury shall, by their verdict, direct.

[In the indictment for manslaughter it is unnecessary to state the manner or means of death; but it suffices to charge that the defendant "did *feloniously kill and slay* the deceased."‡]

2. We are next to consider the crime of deliberate and WILFUL MURDER; a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world, with death. The words of the Mosaical law, over and above the general precept to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed," are very emphatical in prohibiting the pardon of murderers. "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." [And the reason assigned for the prohibition of murder is very awful;—*for in the image of God made He man.*§]

The name of *murder*, as a crime, was anciently applied only to the secret killing of another, which the word *moerda* signifies in the Teutonic language: but is now used without regarding whether the party slain was killed openly, or secretly.

Murder is therefore now thus defined, or rather described, by Sir Edward Coke; "*when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being,*

* Ante pp. 578, 9, chap. LX. † 9 & 10 Vict. c. 93.
‡ Stat. 14 & 15 Vict. c. 100, § 4. § Gen. ix. 6.

and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a "person of sound memory and discretion:" for lunatics or infants, as we have already observed, are incapable of committing any crime, except in cases where they show a consciousness of doing wrong,* and of course a discretion, or discernment, between good and evil.

Next, it happens when a person of such sound discretion "unlawfully killeth." The *unlawfulness* arises, from the killing, without warrant, or excuse: and there must also be an actual killing, to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. [Now, whoever shall stab, cut, or wound any person, or cause to be taken any poison, or other destructive thing, or *by any means whatsoever*, cause to any person any bodily injury dangerous to life, with intent to commit murder, is guilty of felony punishable with death; and the *attempt* to do so, though no bodily injury ensue, is also felony, punishable with transportation for life, or fifteen years.† An assault occasioning actual bodily harm, is a misdemeanor punishable with imprisonment and hard labour: ‡ and the unlawfully and *maliciously* inflicting grievous bodily harm, whether with or without an instrument, and whether the skin be or be not broken, is a misdemeanor punishable with imprisonment not exceeding three years, and hard labour.§] The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome; [and it is no longer necessary

* Ante, p. 616.

† St. 7 Will. IV. & 1 Vict. c. 85, § 2; and see c. 89, §§ 4, 5; and st. 8 & 9, Vict. c. 25, §§ 2, 7.

‡ St. 14 & 15 Vict. c. 100, § 29.

§ Id. § 4.

to set forth in the indictment, the *manner* in which, or the *means* by which, the death of the deceased was caused; but it suffices to charge that the defendant "did *feloniously, wilfully,* and *of his malice aforethought, kill and murder* the deceased."*] There was by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder, for many years past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed. The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor: and among the Romans, the *lex Cornelia de sicariis,* punished the false witness with death, as being guilty of a species of assassination. There is no doubt that this is equally murder, in *foro conscientiæ,* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, do an act of which the probable consequence [—and every man is taken to contemplate the natural and necessary consequence of his own act—] may be, and evidently is, death, such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died; of the woman, who laid her child under leaves in an orchard, where a kite struck it and killed it; and of the parish-officers who shifted a child from parish to parish till it died for want of care and sustenance. So too, if a man, have a beast that is used to do mischief; and he knowing it, suffer it to go abroad, and it kill a man; even this is man-

* 14 & 15 Vict. c. 100, § 4.

slaughter in the owner: but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is with us, as in the Jewish law, as much murder, as if he had incited a bear or dog to worry them. If a physician or surgeon give his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder nor manslaughter, but misadventure. [If, however, a physician or surgeon, whether regularly trained and licensed or not, occasion death through his *gross want of skill, or care*, it is clearly manslaughter, with all its incidents criminal and civil, as already explained.] In order also to make the killing murder, it is requisite that the party die within a year and a day, after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done, shall be reckoned the first.

Further; the person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing. Therefore to kill an alien, or an outlaw, who are all under the queen's peace and protection, is as much murder, as to kill the most regular-born Englishman.

Lastly, the killing must be committed "with malice aforethought," to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart; *un disposition à faire un male chose;* and it may be either express, or implied in law. Express malice is when one, with a sedate deliberate mind, and formed design, doth kill another: which formed design is *evidenced* by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of

deliberate duelling, where both parties meet, avowedly, with an intent to murder; thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of both God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also.

Also, if even upon a sudden provocation, one beat another in a cruel and unusual manner, so that he die, though the former did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia.* As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar, so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolve to kill the next man he meets, and do kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the queen's peace, of which the probable consequence might be bloodshed,—as to beat a man, to commit a riot, or to rob a park: and one of them kill a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata,* or evil intended before-hand.

Also in many cases where no malice is expressed, the law will *imply* it: as where a man wilfully poisons another,

in such a deliberate act, the law presumes malice, though no particular enmity can be proved. And if a man kill another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight, or no, apparent cause. No affront, by *words or gestures* only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder. In like manner if one kill an officer of justice, either civil or criminal, in the execution of his duty, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority, or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. And if one intend to do another felony, and undesignedly kill a man, this is also murder. Thus if one shoot at A, and miss him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the poisoner had no malicious intent, takes it, and it kills him; this is likewise murder. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is [*primâ facie*] malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or if voluntary, occasioned by some sudden and sufficiently violent provocation. And all

these circumstances of justification, excuse, or alleviation, *it is incumbent upon the prisoner* to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away, or mitigate, the guilt. *For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.**

[Every person convicted of murder, or of being an accessory *before* the fact to murder, shall suffer death as a felon; and any accessory *after* the fact (by which is meant, any one who, knowing the murder to have been committed, receives, harbours, or assists the murderer, instead of taking steps to bring him to justice) is liable to be transported, or kept in penal servitude, for life, or be confined, with or without hard labour, for any term not exceeding four years.]

* Foster, 255.

CHAPTER LXV.

INDICTMENT, ARRAIGNMENT, AND TRIAL.

[4 Bl. Com. 302—362.]

An indictment is a written accusation, of one or more persons, of a crime or misdemeanor, preferred to, and presented upon oath [or solemn affirmation] by a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king, shall then and there be commanded them.

They are usually gentlemen of the best figure in the county or borough. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority.

This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench; [who to enable him to discharge this duty efficiently, has read over the depositions against the prisoners to be tried, and thus ascertains whether any difficulty of law or fact requires being noticed, and explained to the grand jury.] They then withdraw, to sit and receive

indictments, which are preferred to them in the name of the queen, but at the suit of any private prosecutor; and they are to hear evidence on behalf of the prosecution only; for the finding of an indictment is only in the nature of an inquiry, or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes: and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, '*ignoramus;*' or, 'we know nothing of it;' intimating, that though the facts might, possibly, be true, that truth did not appear to them; but now they assert in English, more absolutely, 'not a true bill;' or, which is the better way, 'not found;' but a fresh bill may afterwards be preferred to a grand jury at a subsequent assize or sessions. If they are satisfied of the truth of the accusation, they then endorse upon it a 'true bill.' [If there be several defendants, the grand jury may find, or ignore the bill against all, or any they please; and as to all or any of the counts, but not as to a portion of a count.] The bill is then said to be '*found,*' and the party stands 'indicted.' But to find a bill there must at least twelve of the jury agree; for so tender is the law of England of the lives [and liberties] of the subject, that except in the case of summary conviction, no man can be convicted, at the suit of the queen, of any offence, unless by the unanimous voice of *twenty-four* of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it

is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court, and the finding openly proclaimed.

[Some attempts have recently been made to abolish this important institution, and substitute another; but they have not hitherto found favour with the legislature or the public, who are not prepared for so considerable a derangement of our system of criminal judicature. A grand jury is a great bulwark of British freedom, and ought not to be lightly disturbed. It is assuring to the humblest subject, to know that a body of gentlemen, such as form grand juries, and are above all suspicion of undue influence, will, upon their oaths, declare whether there be or be not sufficient grounds for putting him to the anxiety and peril of a public trial; and will do this, also, with complete secresy, secured by oath, as is only reasonable in the case of an *ex parte* criminal charge. And besides all this, it is an institution very dear to Englishmen, because it makes so many of them parties to the administration of criminal justice. If it be suggested that miscarriages may occasionally occur in the grand jury room, it should be remembered what countervailing advantages attend the institution:—that grand jurymen are generally gentlemen of education and experience; have the advantages of public judicial assistance in cases of the least difficulty or importance; and the indictment with which they deal is now, as it were, shrunk into a span, and divested of every needless technicality.]

When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be 'ARRAIGNED' * thereon.

To arraign, is nothing else but to call the prisoner to the

* Sir Matthew Hale says that the word "*arraign*," is no other than "*ad rationem ponere*;" and in French, "*ad reson*," or abbreviated, "*à resn.*"

bar of the court, to answer the matter charged upon him in the indictment.

When brought to the bar, he was always called upon, by name, to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand, he owns himself to be of that name by which he is called. [In practice it is required for the purpose of identification, only when there are several arraigned at the same time.]

Then the indictment is to be read to him, distinctly, by the officer of the court, that he may fully understand the charge. After which, it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.

When a criminal is arraigned, he either stands mute, or confesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment.

[If he say nothing, the court may, if it think fit, order a plea of not guilty to be recorded, and proceed as if he had pleaded it; or empanel a jury to try whether he be insane, in which case he cannot be tried; or dumb by the visitation of God, in which event the court proceeds as if he had pleaded not guilty.*

[Upon a simple and plain confession, the court has nothing to do but award judgment, but is usually very backward in receiving and recording such confession, out of tenderness to the accused; and will generally advise the prisoner to retract it, and plead to the indictment; or at least distinctly apprise him of the consequences of confession, and that it cannot operate in mitigation of punishment.]

The plea of not guilty, is the only one on which [in case of trial] the prisoner can receive final judgment. [Under it, the prosecutor must prove the whole case for the crown, and the accused may offer his defence by way of either

* Stat. 7 & 8 Geo. IV. c. 28.

denial, excuse, or justification. On this plea, the crown and the prisoner are at once brought to issue on the merits of the case, and the trial, subject to the order of the court as to an adjournment or postponement, proceeds. And here it should be stated, that since the recent statute 14 & 15 Vict., c. 100, §§ 26, 27, the right *to traverse,* i. e. to postpone the trial to a future assize or session, is taken away alike in misdemeanors and felonies; but the court may, if the interests of justice require it, adjourn the trial to the next sessions or assizes, on such terms as it may deem meet.

[When the trial is called on, every objection to the indictment, for any *formal* defect apparent on the face of it, must be taken by, or on behalf of the prisoner, before the jury are sworn, and not afterwards; but though there should appear to be such formal objection, the court may, if it be thought necessary, amend it, and the trial is then to proceed as if no such defect had appeared.*

[The next step, in the ordinary course is, if no application be made by the crown or prisoner to postpone the trial, to swear the jury as they appear, to the number of twelve, unless they are challenged by the party.

[Challenges may here be made, but not till after a full jury has appeared, on the part of either the queen, or the prisoner; and to either the whole array, or the separate polls: i. e. to the whole jury panel, or particular jurymen.]

In cases of felony, but not of misdemeanor, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all: which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare

* Stat. 14 & 15 Vict. c. 100, § 25.

looks and gestures of another; and how necessary it is, that a prisoner, when put to defend his life [and liberty], should have a good opinion of his jury, the want of which might totally disconcert him;—the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference, may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he please, peremptorily to set him aside.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the crown, by the statute [6 Geo. IV. c. 50, § 29.] which enacts that the crown shall challenge no jurors, without assigning a *cause* certain, to be tried and approved by the court. However, it is held, that the crown need not assign its cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the counsel for the crown must show the cause: otherwise the juror shall be sworn.

The *peremptory* challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the law to be the number of twenty in felony, and thirty-five [that is one under the number of three full juries] in treason: and if he challenge more, his challenges are void, and to be disregarded. For the law judges that number fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number has no intention to be tried at all. [It is not competent to ask any juryman, whether special or talesman, if he have not expressed opinions hostile to the defendant and his cause, in order to found a challenge to the polls on that account, for it tends greatly to his dishonour; such

expressions must be proved by extrinsic evidence.* The course usually adopted in such a case, is for counsel privately to intimate to the proper officer that they wish a particular juryman not to be called on the jury; and that intimation is sufficient. If from the success of the challenge, or default of jurors, a sufficient jury cannot be obtained, a *tales* may be awarded, if the prosecution be in the queen's bench; if under a commission of gaol delivery, the court orders, *ore tenus*, a new panel to be returned *instanter*.

[When the jury is sworn "well and truly to try, and true delivery make, between our sovereign lady the queen and the prisoner, whom they have in charge, and a true verdict to give, according to the evidence," the indictment is usually opened, and the evidence examined, by the counsel for the crown, or prosecution; and since the year 1836, [stat. 6 & 7 Will. IV. c. 114 § 1,] all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence, whether with or without witnesses, by counsel, or by attorney, where attornies practise as counsel: being also at as full liberty, as in civil cases, to cross-examine and take objections during the case for the prosecution. Owing to the grievous increase of perjury, all courts of justice civil or criminal, down to justices in special or petty sessions, are now (stat. 14 & 15 Vict. c. 100, § 19) empowered forthwith to commit and direct to be prosecuted any one appearing to them guilty of perjury, if there appear a reasonable cause for such prosecution, and to bind over the necessary witnesses.]

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes: only they

* Per Lord Tenterden, C. J. *The King* v. *Edmunds*, 4 B. & Ad. 471. In the judgment in this case the law relating to challenges is luminously discussed.

cannot, in a criminal case, which touches life or member, give a privy verdict. But the judge may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance on the facts stated, it be murder or manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths. In many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict has been mercifully set aside, and a new trial granted by the court of queen's bench; for in such case, as has been said, it cannot be set right by attaint. But there has yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first.

If the jury, therefore, find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large, without payment of any fee to the gaoler. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways; by either his confessing the offence, and pleading guilty; or, by his being found so, by the verdict of his country. [If after proper time elapsed for full consideration, the jury have not agreed, nor appear likely to do so, the judge may discharge them: and so if a juryman become ill. In either case, however, the prisoner can be put again on his trial. There are also other cases in which the jury may be discharged; one of them by reason of a recent enactment which has been already alluded to.

CHAPTER LXVI.

JUDGMENT, AND REVERSAL OF JUDGMENT.

[4 Bla. Com. 375—393.]

When the jury have brought in their verdict of guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after asked by the [proper officer of the] court, if he have anything to offer, why *judgment should not be awarded against him*. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does often, happen in his absence, after he has once appeared), a *capias* is awarded and issued, to bring him in to receive his judgment; and if he abscond, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, but for matter of *substance* only, in arrest or stay of judgment. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.

A pardon may be pleaded in arrest of judgment.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime.

When sentence of death, the most terrible and the highest judgment in the laws of England, has been pronounced, the immediate inseparable consequence from the common law is

attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and (subject to recent humane relaxation of its sternness,)* takes no further care of him, than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation, nor capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law. This is after judgment, for there is a great difference between a man *convicted*, and *attainted;* though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of those disabilities: for there is still in contemplation of law, a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, which supposes some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And, therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be *attainted*.

We are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of

* *Post*, Chap. LXVIII.

doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

[And here it is proper to state more fully, a salutary and great alteration in the law, to which allusion was made in a preceding chapter. By statute 11 & 12 Vict., c. 78, passed in the year 1848, it was declared expedient to provide a better mode than that then in use, of deciding any difficult question of law, which might arise in criminal trials. And it was thereby enacted, that when any person shall be *convicted* of any treason, felony, or misdemeanor before any court of oyer and terminer, or gaol delivery, or court of quarter-sessions, the judge or justices before whom the case was tried, may, *in their discretion*, reserve any question of law which may have arisen on the trial, for the consideration of five, at the least, of the judges of the superior courts of common law, met together in the Exchequer Chamber, or other convenient place;—and may either postpone pronouncing judgment at the trial, or respite the execution of the judgment if pronounced, till the question shall have been considered and decided: in the mean time committing the person convicted to prison, or admitting him to bail, to appear as he may be required.

[The judge is to state the question of law, and circumstances out of which it arose, in a Case, to be transmitted to the superior judges; who are empowered finally to determine the question, and reverse, amend, or affirm the judgment; or avoid it, and order an entry to be made on the record, that the party ought not to have been convicted; or to arrest the judgment; or order judgment to be given at some other session, if it have not been given; or make such other order as justice shall require. The judgment or order is to be certified, under the hand of the presiding chief-justice or baron (who must be one of the five), to the clerk of assize, or of the peace, who is to enter it on the record. This certificate is to be a sufficient warrant, to

the sheriff, or justice, for the execution of the judgment, as affirmed or amended, or the immediate discharge of the person convicted, from further imprisonment, or vacating the recognisance of bail, if the judgment shall have been reversed, avoided, or arrested: but if the court below be directed to give judgment, they must do it at the next session.

[By this means, the prisoner has the full benefit of a writ of error, speedily, and cheaply; but the proceeding by writ of error is not interfered with: for the judge before whom the trial took place, may not choose to grant a 'case' for the court of appeal under the above-mentioned statute: and then no course is open but to reverse the judgment by writ of error.]

A judgment may however be falsified, reversed, or avoided, in some cases, without a writ of error; thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void: and may be falsified by showing the special matter, without writ of error.

A judgment may also be reversed, by WRIT OF ERROR; which lies from all inferior criminal jurisdictions to the court of queen's bench, and from the queen's bench to the house of peers; and may be brought for notorious and substantial mistakes in the judgment or other parts of the record: as, where a man is found guilty of misdemeanor and receives the judgment of felony. [A writ of error, in case of *misdemeanor*, cannot be obtained without showing probable cause to the attorney-general, who will then grant his *fiat*; but the court of queen's bench will not interfere where he has exercised his discretion in the matter. If, however, he should have altogether refused to hear the application, they would compel him to do so, by mandamus.*

[The same statute which created the court of criminal appeal, contains (§.5) an important provision with reference

* *Ex parte Newton*, Easter Term. 1855.

to writs of error: that whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition,* in *any* criminal case, and the court of error shall reverse the judgment, it shall be competent for that court, either *itself to pronounce the proper judgment*, or to remit the record to the court below in order that it may pronounce the proper judgment. It may be, that this enactment refers only to cases where the error is in the *judgment* itself: as where transportation is awarded instead of imprisonment, or *vice versâ*. If the judgment be falsified or reversed on substantial grounds, the whole proceedings on which it had been founded, are annulled; but the party remains liable to another prosecution for the same offence; since the past having been erroneous, he is held not to have been in jeopardy, and therefore not within the protection of the rule, *Nemo debet bis vexari pro eâdem causâ*: for, in contemplation of law, he had never been indicted, or convicted.]

Lastly, an attainder may be reversed by ACT OF PARLIAMENT. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by act of parliament; which, so far as it extends, has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

* No writ of error lies on a summary conviction: for there is no proof before a jury, nor any *indictment*. *Anon.* Ventris, 33.

CHAPTER LXVII.

REPRIEVE; PARDON.

[4 Bla. Com. 394—406.]

THE only other remaining ways of avoiding the execution of the judgment, are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

i. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment: as, where the judge is not satisfied with the verdict, the evidence, or the indictment; or sometimes if any favourable circumstances appear in the criminal's character, in order to give time to apply to the crown, for either an absolute or conditional pardon.

ii. The last and surest resort, however, is in the queen's most gracious PARDON; the granting of which is the most amiable prerogative of the crown. Law, says an able writer,* cannot be framed on principles of compassion to guilt; yet, justice, by the constitution of England, is bound to be administered in mercy; this is promised by the queen in her coronation oath,† and it is that act of her government, which is the most personal, and most entirely her own. The queen herself

* Law of Forfeitures, 99. † Ante, p. 228.

condemns no man; that rugged task she leaves to her courts of justice: the great operation of her sceptre, is mercy. Her power of pardoning was said by our Saxon ancestors to be derived *à lege suæ dignitatis:* and it is *declared* in parliament, by statute 27 Hen. VIII. c. 24 that no other "person hath power to pardon or remit any treasons, murders, manslaughter, or felonies whatsoever, nor any accessories to the same, nor any outlawries for such offences; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm, as of good right and equity it appertaineth."

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.

[The sovereign is entrusted with this high prerogative, upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules; which the wisdom of man cannot possibly make so perfect as to suit every particular case. "It is a power," says Lord Holt,* "inseparably incident to the crown and its royal power; 'tis as much for the good of the people that the king should pardon, as that he should punish. He is the best judge of his own mercy." In the case in which this was delivered, it had been urged that the king could not pardon murder, at common law: being but a trustee, and all the people having an interest in the justice of the realm: that since Christianity was planted in England, murder was always a crime beyond mercy: and that when Abel was slain by Cain, it is said, according to some readings,

† *Rex* v. *Parsons*, 1 Shower, 284.

that "his offence was too great to be forgiven:' to which Lord Holt replied as above, adding—"and for your doctrine about Cain, he was pardoned for his life." And Dolbin, J., said, "that the king, at common law, had power to pardon *all* offences."

[Sir Edward Coke speaks * thus heartily of the benignant prerogative in question, "We have spoken of the royal and establishing virtue of justice: royal and establishing I say, because, by justice the royal throne is established. We are now to speak of mercy: for the Holy Spirit saith, *Mercy and truth preserve the King, and by clemency is his throne strengthened*:† and hereupon is the law of England grounded. Of this royal virtue we shall speak the more willingly, for that all sanctuaries, and places for refuge, for safeguard of life, are taken away." He then defines a pardon thus:— "A pardon is a work of mercy, whereby the king, either *before* attainder, sentence, or conviction, or *after*, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." But it is to be observed, he adds, that the laws of this realm have in some sort limited and bounded the king's mercy.

[First, then, the queen may pardon all offences merely against the crown, or the public; excepting, firstly, that, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *habeas corpus* act, 31 Car. II., c. 2, made a *præmunire*, unpardonable even by the queen. Nor, secondly, can the queen pardon, where *private* justice is principally concerned in the prosecution of offenders: *non potest rex gratiam facere, cum injuriâ et damno aliorum*.‡ But a relaxation of this rule is made by statute 7 & 8 Geo. IV., c. 29. § 69—which enables the queen to extend her royal mercy to any person imprisoned under that act (consolidating and amending the laws

3 Inst. 233. † Prov. xv. 28.
‡ 3 Co. Instit. 236.

relative to larceny), although he shall be imprisoned for non-payment of money to some party *other than the crown.*] The queen, again, cannot pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards she may remit the fine: because, though the prosecution be vested in the queen, to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a private injury, to each individual in the neighbourhood, than of a public wrong. Neither, lastly, can the queen pardon an offence against a popular or penal statute, after information brought: for thereby the informer has acquired a private property in his part of the penalty.

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments: viz., that the queen's pardon cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. When, therefore, in the reign of Charles II., the Earl of Danby was impeached by the house of commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged, "that there was no precedent, that ever any pardon was granted to any person, impeached by the commons, of high treason, or other high crimes, depending the impeachment;" and thereupon resolved, "that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England;" for which resolution they assigned this reason to the house of lords, "that the setting up a pardon to be a bar of an impeachment, defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government, would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted,

"that a pardon is not PLEADABLE IN BAR of an impeachment." And, at length, it was enacted by the Act of Settlement, 12 & 13 Wm. III., c. 2, "that no pardon under the great seal of England shall be PLEADABLE to an impeachment by the commons in parliament." But after the impeachment has been solemnly heard and determined, it is not understood that the queen's royal grace is further restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length, received the benefit of the king's most gracious pardon.

[It appears, from a record quoted by the earliest annotator upon the commentaries,* to have been at once asserted by Edward III., and acknowledged by the commons, that the royal prerogative to pardon delinquents *convicted* on impeachment, is as ancient as the constitution itself.

[After the lords have delivered the sentence of guilty, the commons, also, have virtually the power of pardoning the impeached convict, by refusing to demand judgment against him: for none can be pronounced by the lords, till demanded by the commons.

[A pardon must be under the great seal, or by a warrant under the sign manual; and by statute 7 & 8 Geo. IV. c. 28 § 13, it is enacted, that where the royal mercy is extended to any offender convicted of any felony punishable with death, or otherwise,—and by warrant under the royal sign manual, counter-signed by one of the principal secretaries of state, a *free* or a *conditional* pardon shall be granted;—the discharge of the offender out of custody, in the case of a free pardon, and *the performance of the condition* in the case of a conditional pardon, shall have the effect of a pardon under the great seal, of such offender. And by a subsequent statute 9 Geo. IV. c. 32 § 3, in

* Mr. Christian, Vol. iv. p. 400, n. (r).

order to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who shall have undergone the adjudged punishment, it was enacted that the enduring of such punishment, shall have the like effects and consequences as a pardon under the great seal. Both these important enactments, however, are subject to the proviso, that the enduring such punishment shall not *prevent* or *mitigate* any punishment to which the offender might be lawfully sentenced, on a *subseqent* conviction, for *any other* felony.—Independently of this statutory recognition of a conditional pardon, it is clear that at common law the crown has power to extend its mercy on what terms it pleases; and consequently may annex to a pardon any condition which the crown may think fit, whether precedent or subsequent, on the performance of which the validity of the pardon will depend.*

[In the year 1848, however, a strange point was started, by one convicted, on the clearest possible evidence, of high treason in Ireland. It was thought by the crown, that consistently with public safety, mercy might be extended to him; and an intimation was given him,—after the house of lords had unanimously decided, on writ of error, that the conviction was valid, and he consequently liable to the full sentence of the law,—that on the condition of his being transported beyond the seas for life, his life should be spared. It might have been expected, said the lord chief justice (lord Campbell), in his place in the house of lords,† that the boon would have been thankfully accepted: but the prisoner objected that the crown had no right thus to exercise the prerogative of mercy, acknowledging that his life was forfeited, and he liable to suffer an ignominious death! He contended that there was no power to force such conditions on him; and he rejected them. Though there could be no

* Co. Litt. 274 (*b*); Hawk. P. C., Book ii. c. 37, § 45.
† Hansard, Vol. cvi. c. 159, N. S.

real doubt on the subject, in order to remove all shadow of doubt and cavil, a declaratory act was forthwith passed (12 & 13 Vict. c. 27), reciting the doubts which had arisen as to the power of the crown to mitigate the punishment of offenders under judgment of death, for treason, in Ireland. The queen was thereby expressly empowered, by warrant, under the royal sign manual, or the lord lieutenant, by a warrant signed by him, whenever the queen, or lord lieutenant, should be pleased to extend mercy to any offender under sentence of death in Ireland, for any offence whatsoever by law punishable with death, to order the transportation of such offender for his natural life, or any term of years expressed in the warrant.*

[The queen's pardon of an offender makes him, in the language of Lord Holt,† as it were a new man, and gives him a new capacity and credit. "It doth clear not only the offence itself, but all the dependances, penalties, and disabilities incident unto it."‡ In the language of Patteson, J., on a recent occasion, § after citing these authorities, "the pardon releases from all consequences attaching or incident to the conviction. Though the evidence justified the verdict, the pardoned person is to be treated as not guilty of the offence, as much as if a verdict of not guilty had been returned. To give less effect than this, to the pardon of the crown, would be in truth taking upon ourselves to question the propriety of the exercise of an undoubted prerogative of the crown, and to abridge the benefits which it

* It was not pretended to be doubted that such power existed in England, with reference alike to high treason and felony. "I think," said Lord Campbell (Hansard *suprà*), "that high treason is felony:—so says Lord Hale, so says Blackstone, so says every great judge of criminal law." The prisoner had contended that treason was not felony, which alone was mentioned in stat. 3 Geo. III. He was shortly afterwards transported, but has been lately liberated, on condition of not returning to the United Kingdom.

† Hawkins, Book ii. c. 37, s. 48.

‡ *Cuddington* v. *Williams*, Hobart, 82.

§ *In re Barber*, Legal Observer, 20th July, 1850.

has thought fit to confer".—A pardon, finally, so far clears him who has received it from the infamy and all other consequences of his crime, that "he may have an action for a scandal, for calling him traitor or felon, after the time of the pardon."* In short, the felony is, by the pardon, extinct. If, however, a pardon be not allowed till after attainder, nothing can restore or purify the blood, once corrupted, but the high and transcendent power of parliament.†]

* Hobart, 81; Hawk. *ubi suprà*. † 4 Bla. Com. 402.

CHAPTER LXVIII.

PUNISHMENT—EXECUTION.

[THERE now remains nothing to speak of but Execution; using that word, at present, in its larger sense, as designating the carrying into effect of every kind of punishment, the infliction of which is authorised by law, provided its hand be not stayed, wholly or for a time, by the mercy of the crown, or for certain other reasons; the chief of which are insanity of the prisoner, or in the case of a female, her being *quick* with child, by which is meant the child being alive in the womb. This fact, if pleaded in stay of execution, is, according to law, to be ascertained by a jury of matrons, or discreet women, whom the judge must direct to inquire into the fact. In the year 1847, however, a case occurred at the Central Criminal Court, showing this method to be neither a safe nor proper one. A female named Mary Ann Hunt, in September of that year, on conviction for murder, pleaded that she was quick with child; on which a jury of matrons was forthwith impanneled to try the fact. They unanimously declared that she was *not* quick with child; but the Secretary of State subsequently ordered an examination of the woman by three eminent accoucheurs, who unanimously declared that she *was!* and she was respited accordingly, till a reasonable time after her

delivery, which happened a few months afterwards,* and she was ultimately transported.—As to insanity, if a prisoner become *non compos mentis* between the judgment and award of execution, he shall not be ordered for execution; for the law considers that peradventure he might have offered some reason, if in his senses, to have stayed such execution. To hang a madman, should be, says Lord Coke,† a miserable spectacle,—both against law, and of extreme inhumanity and cruelty, and can be no example to others; and the prisoner will be reprieved accordingly.

[It is one of the glories of our English law, observes the commentator ‡, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of impunity or mitigation with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

[The tenth article of the famous Bill of Rights § declares that "EXCESSIVE BAIL ought not to be required, nor EXCESSIVE FINES imposed; nor CRUEL AND UNUSUAL PUNISHMENTS inflicted." Bearing this in mind, let us now see what are punishments ordained by law; and which it is

* MS. Note, (S. W.)

† 3 Inst. 6.

‡ 4 Com. 377.

§ 1 Will. and Mary, Sess. ii. c. 2.

necessary should be carried into effect, in exact conformity with that law, on pain of serious civil and criminal liability.

[The pillory was abolished in the year 1837, by an act (stat. 7 Will. IV. and 1. Vict. c. 23) passed solely for that purpose. The stocks and ducking stool have fallen into disuse, the latter altogether: but, as to the former, a constable may, by common law, confine offenders in them by way of security only, not of punishment; which however, is allowed to be inflicted on offenders, after conviction, by various statutes. The other legal modes of punishment are, fine, forfeiture, imprisonment, hard labour, solitary confinement, whipping, transportation, penal servitude, death,—with, in case of high treason, and murder, corruption of blood, and in high treason, decapitation and quartering of the body.

[i. As to *fines*, their *quantum* depends on the discretion, legally exercised, of the court or judge imposing them, with reference to the nature and occasion of the offence, and the position and circumstances of those on whom they are imposed. When the judges imposed a fine of 30,000*l.* on the Duke of Devonshire, for striking within the limits of one of her majesty's palaces, the house of lords decided that their conduct was oppressive, and *illegal.**

[ii. *Forfeitures* of real estate, and of goods and chattels, are respectively, in case of treason, misprision of treason, felony of every kind, (including felonious suicide,) striking in the superior courts of Westminster Hall, or drawing a weapon on a judge presiding there. On attainder for treason the forfeiture of lands of fee simple or fee tail relates backwards to the date of the offence, so as to avoid all intermediate sale and disposal of them, and they are for ever vested in the crown. By attainder for felony, are forfeited all the offender's goods and chattels, and profits of all estates of freehold, during life: and by attainder for murder, lands in

* 11 Harg. State Trials, 136; 4 Steph. Com. 489.

fee are forfeited to the crown for a year and a day.* The forfeiture relates back, as in treason, to the date of the offence committed, and for the same reason. In the case of misprision of treason, striking in the superior courts, and drawing a weapon on a judge, the forfeiture is of the profits of land during life. The forfeiture of goods and chattels accrues in treason, misprision of treason, felonious suicide, and the two offences just mentioned, in courts of justice.

[iii. *Corruption of blood* follows attainder only in treason, and murder.

[iv. *Imprisonment*, like fines, must be reasonable. At common law, the ordinary limit is two years, except in very gross cases; and in the vast number of instances in which it is imposed by statute, the extent is almost invariably limited to three, or at most four years; and it may be, but only by statute, accompanied by,

[v. *Hard labour*; †

[vi. *Solitary confinement*, but for no longer a period than a month at a time, or three months within one year; or

[vii. *Whipping*. This was originally a common law punishment, inflicted on persons of '*inferior*' condition, for small larcenies and other offences. It was first ordered, by statute, in the year 1779 (stat. 19 Geo. III. c. 74,) instead of burning in the hand. By subsequent statutes, for the offences created by stat. 9 & 10 Vict. c. 25, the age of the offender must not exceed eighteen (§ 9), and in whippings inflicted by magistrates on juvenile offenders, fourteen years, (13 & 14 Vict. c. 37, §1; 10 & 11 Vict. c. 82, §1). In almost all except the last case, the whippings may, for one offence, be once, twice, or thrice, and in public or private; but in this last, there must be present, to avoid collusion or abuse, not fewer than two persons besides the offender and the officer who inflicts the whipping (stat. 19 Geo. III.

* See stat. 54 Geo. III. c. 145.

† Hard labour is stated first to have been imposed in the year 1706, by stat. 5 & 6 Anne, c. 6. See *The Queen* v. *Baker*, 7 Ad. & Ell. 503.

c. 74, § 3). But neither public nor private whipping can be inflicted on a female, for any offence whatever (stat. 1 Geo. IV. c. 57, § 2). By stat. 5 & 6 Vict. c. 51, any one attempting, and intending, to injure her majesty's person, or alarm her, or commit a breach of the peace, is guilty of a high misdemeanor, and liable to be imprisoned, with or without hard labour, for not more than three years, and during such imprisonment to be publicly or privately whipped, as often, not exceeding thrice, and in such manner, as the court shall order; there being purposely no limitation as to the age of the offender. In many cases, the court is empowered to inflict, for the same offence, at once imprisonment, hard labour, solitary confinement, and whipping.

[viii. *Transportation*, a punishment unknown to the common law, and inflicted only by authority of some statute, is said to have been first imposed in the year 1717, by stat. 4 Geo. I. c. 11 § 1.* It may be for life, or since the year 1853, for not less than fourteen years. In that year was passed statute 16 & 17 Vict. c. 99, in consequence of the resistance of our colonies to being made penal settlements: and the act recites that by reason of the difficulty of transporting offenders beyond the seas, it had become expedient to substitute, in certain cases, other punishment in lieu of transportation. The statute prohibits transportation for a period less than fourteen years or upwards; and authorises the court to order an offender, in lieu of all periods of transportation, even for life, in the discretion of the court, to be "kept in Penal Servitude," either for life or such other periods as the act has fixed, in any prison, place of confinement, river, port, or harbour of the United Kingdom, where persons under sentence of transportation may now be confined; or in any part of Her Majesty's dominions beyond sea, or in any port or harbour thereof, as one of the Secretaries of State may from time to time

* *R.* v. *Baker*, *supra*.

direct: and be during that time kept to hard labour, and otherwise dealt with in all respects, as persons sentenced to transportation might be. Conditional pardons are allowed, as in case of transportation; power is given to a Secretary of State, to give a written license to any one under a sentence of transportation, or of penal servitude, to be at large within the United Kingdom and the Channel Islands, during the period of their sentence, on such conditions as Her Majesty may deem fit; and she may revoke or alter the license at pleasure, and the convict shall in that case, by warrant under the hand and seal of a Secretary of State, be apprehended and re-committed, "to undergo *the residue* of the sentence."

[Where a statute has awarded a sentence of transportation for life, or some long term of years, or when the imprisonment is to be for not less than two years, the court may, if it think fit, pass sentence of transportation for a less term, but not under fourteen years; or penal servitude for a period not less than four years;—and may pass a sentence of imprisonment, with or without hard labour, for a less period than two years.*—In the case of a prisoner, already under a sentence of imprisonment, penal servitude, or transportation, being sentenced for a subsequent felony to imprisonment, penal servitude, or transportation, it may commence at the expiration of the former period.†—Neither transportation nor penal servitude can now be awarded, in the first instance, for a *simple* larceny, but a sentence of imprisonment with or without hard labour, solitary confinement, or whipping: but after a second conviction of felony, not punishable with death, the offender is liable to be transported for life, or for not less than fourteen years, or to penal servitude for not less than four years, or imprisonment for any term not exceeding four years, and also

* Stat. 9 & 10 Vict. c. 24, § 1; 16 & 17 Vict. c. 99, §§ 3, 4, 7.

† Stat. 7 & 8 Geo. IV. c. 28, § 10.

to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. The previous conviction, must, and as many as have happened, may be, charged in the indictment to warrant the heavier punishment.* The object of thus showing a previous conviction, is to justify the increased punishment. It is also advisable for the judge to know how often the person has been convicted before; and besides, it may be useful if a difficulty as to the personal identity should arise in respect of either or any of such previous convictions.†

[*Death.* We have already seen the mode of inflicting capital punishment on a traitor, sufficiently frightful now, if fully carried out: statute 54 Geo. III. c. 146 § 1, passed in the year 1814, enacting, that he shall be drawn on a hurdle to the place of execution, and there hanged by the neck till he be dead; and that afterwards the head shall be severed from the body,‡ and the body, divided into four quarters, shall be disposed of as his majesty and his successors shall think fit. But "his majesty may, after sentence, order, by warrant under his sign manual, that the traitor shall not be drawn, but taken otherwise to the place of execution; and instead of being hanged by the neck, the head shall be severed from the body, while alive; and his majesty may also, in the warrant, order how the body, head, and quarters, of the deceased traitor shall be disposed of." The king may, and often does, says Blackstone § discharge all the punishment, except beheading, especially where any of noble blood are attainted. By statute 30. Geo. III. c. 48 § 1, passed in the year 1790, a female traitor is no longer to be burned to death, but hanged, with forfeiture and corruption of blood, as before.

* Stat. 7 & 8 Geo. IV. c. 28, § 11.

† Per Lord Campbell, *Reg.* v. *Clarke*, 22 Law J. (N.S.), Mag. Cas. 135.

‡ This was done, at the Old Bailey, in the case of *Thistlewood* and his Cotraitors.

§ 4 Com. 93.

[We have finally to consider the mode of executing capital punishment, in the very few other cases in which the law now awards it.—In any case of a capital felony, except murder, the judge may, if he deem it a fitting case for recommendation to the royal mercy, abstain from *pronouncing* judgment of death, and order it to be simply entered of record, as if the judgment had been actually pronounced in open court: and such record shall have the like effect, to all intents and purposes, and be followed by all the consequences, as if the judgment had been actually pronounced in open court, and the offender had been *reprieved* by the court.* The object of this act was to prevent the appalling solemnities of a public sentence of death, being rendered nugatory, and a mere mockery, by the knowledge of all present that it was not intended to be carried into effect. It was held by Lord Denman,† that even in a case of murder, when the judge is of opinion that the life of the prisoner should be spared, the court has the power of recording, instead of actually passing, sentence of death; since by a subsequent statute which will be presently noticed, it is enacted that sentence of death may be pronounced, after convictions for murder, "in the same manner, and the judge shall have *the same power* in all respects, as after conviction for other capital offences."

[Except in the case of treason, when the sovereign thinks fit, as above mentioned, to order a *man* convicted of high treason to be beheaded, the only mode of inflicting capital punishment in this country is, by "hanging him by the neck till he be dead:" and which is now carried into effect with a kind of dreadful, yet merciful, celerity. Whence it follows, that should the criminal, which is all but absolutely impossible now to happen, be taken down only apparently dead, and he revive, he must be hanged again.‡

* Stat. 4 Geo. IV. c. 48, A.D. 1823.

† *Reg.* v. *Hogg*, 2 Moo. & Rob. 381.

‡ 2 Hale, P. C. 412, Hawkins, P. C. Book ii. c. 51, § 7.

The bodies of those guilty of murder are no longer dissected, or hung in chains; but the sentence expresses that they are to be "buried in the precincts of the prison."* Nor is the criminal any longer executed on the day but one after the sentence, nor fed with bread and water, from the time of judgment to execution, nor prohibited from seeing any one but the gaoler and his servants, and the chaplain and surgeon. By statute 6 & 7 Will. IV. c. 30, such enactments as imposed these harsh conditions, are repealed: with the particular recital, as to the first, that it was "for the ends of justice, and, especially, more effectually to preserve from *an irrevocable* punishment, any persons who may thereafter be convicted upon erroneous, or perjured evidence." It also enacts (§ 2), "that sentence for death may be pronounced after conviction for murder, in the same manner, and the judge shall have *the same power, in all respects*, as after conviction for other capital offences."

[Finally, the law knows no distinction of persons in trying those charged with, and punishing those guilty of, crime. By statute 4 & 5 Vict. c. 22, passed in the year 1841, it was enacted, to obviate all possible *doubt* as to any person still being entitled to benefit of clergy, which had been abolished by stat. 7 & 8 Geo. IV. c. 28, § 6, that "every lord of parliament, or peer of the realm having place in parliament, against whom any indictment for felony may be found, shall plead to such an indictment, and shall upon conviction, be liable to the same punishment as any other of Her Majesty's subjects are, or may be, liable upon conviction for such felony."]

"And having thus arrived," says the commentator,† 'at the last stage of criminal proceedings, or execution,—

* Stat. 2 & 3 Will. IV. c. 75, § 16; 4 & 5 Will. IV. c. 26, § 1.
† 4 Com. 406.

the end and completion of human punishment,—it may now seem high time to put a period to these commentaries. But the author cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory, some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions which have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next, or concluding chapter."

That luminous and comprehensive review will now be presented to the student, entire: it being left to himself to bear in mind, that a century has nearly elapsed since it was written; and to illustrate, *or qualify*, its statements, by such information as may be found in the foregoing pages, and in the continuation at the close of the chapter.

CHAPTER LXIX.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND. [TO ABOUT THE YEAR 1768–9.*]

[4 Bla. Com. 407, *ad finem.*]

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out, in the course of these commentaries, under their respective divisions; these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods, under which I shall consider the state of our legal polity, are the following six: I. From the earliest times to the Norman conquest; II. From the

* Sir William Blackstone died on the 14th of February, 1780; but the last volume of the Commentaries was printed in the year above-mentioned.

Norman conquest to the reign of King Edward the First; III. From thence to the Reformation; IV. From the Reformation to the Restoration of king Charles II.; V. From thence to the Revolution in 1688; VI. From the Revolution to the present time, [circiter, 1768—9.]

I. And, first, with regard to the ancient Britons, the aborigines of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be fruitless and defective. However, from Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centred all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed, we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters: since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not, in any of them, the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind,* which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII., is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume,† where the same custom has con-

* Gavel-kind was a custom by which lands descended to all the sons at once, instead of the eldest son only.

† The fourth volume of the Commentaries.

tinued from Cæsar's time to [within the last few years]; that of burning a woman guilty of the crime of petit treason by killing her husband.]

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution, the Romans, the Picts, and after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages, in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy when the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce that *this* custom was derived from the Britains; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of

the kingdom and its government, which alone, though it had been disturbed by no foreign invasion, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof as the Jews had by the hand of Moses. Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby Christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this, perhaps, may have partly been the cause that we find not only some rules of the mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A farther reason may be also given for the great variety and of course the uncertain original, of our ancient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into an heptarchy, consisting of seven * independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies of Jutes, Angles, Anglo Saxons, and the like, originally sprung from the same mother-country, the great northern hive: which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution

* Eight, or an Octarchy, according to Mr. Turner, Hist. Anglo-Sax. Vol. I.

and superstructure of government, though they all begin to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder,* his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner; no less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old discordant materials which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his Dom-bec, or *liber judicialis*.† This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn‡; tribunals which he established,

* Ante p. 171 (note). † *Sed vide ante*, pp. 1, 44.

‡ The court-baron was the court of civil, and the court-leet that of criminal jurisdiction within a *manor*. The county-court was that of civil, and the sheriff's-tourn that of criminal jurisdiction, within a county. The hundred-court was in the hundred, what the county-court was in the county.—J. W. S.

for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient laws: retaining however some few of the customs of their late visitants; which went under the name of *Dane-Lage:* as the code compiled by Alfred was called the *West-Saxon-Lage;* and the local constitutions of the ancient kingdom of Mercia, which obtained in the countries nearest to Wales, and probably abounded with many British customs, were called the *Mercen Lage.* And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of the counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used have, (as we shall see,) often suffered considerable changes.

For king Edgar (who besides his military merit as founder of the English navy, was also a most excellent civil governor), observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and began what his grandson king Edward the Confessor afterwards completed: namely, one uniform digest or body of laws to be observed throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with some improvements suggested by neces-

sity and experience; particularly the incorporating some of the British, or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the ground-work of the whole. And this appears to be the best supported and most plausible conjecture, (for *certainty* is not to be expected), of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of 'the common law,' as extending its authority universally over all the realm; and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation: the *wittena-gemote*, or *commune consilium* of the ancient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people: originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers, or heretochs, their sheriffs, their conservators of the peace, their coroners, their port-reeves, since changed into mayors and bailiffs, and even their tithing-men and borsholders at the leet, continued, some to the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued: only that, perhaps in case of minority, the next of kin of full age would ascend the throne as king, and not as protector: though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or were-gild, or, in default of payment,

perpetual bondage; to which our "benefit of clergy" has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feodal constitution; but were yet exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feodal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though really inconvenient, and more especially destructive to ancient families: which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety, the king's court held before himself in person, at the time of his parliaments, which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by king Alonzo VII. of Castile, about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home. These county courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together,

the bishop and the alderman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the *cornsned* or morsel of execration,* or by wager of law with compurgators,† if the party chose it; but frequently they were also by jury: for, whether or not their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion; when the SECOND PERIOD of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws as it did in our ancient line of kings: and though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations, we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish

* The trial by *corsned*, which was a kind of ordeal, was when the defendant took the sacrament, invoking Heaven at the same time to witness his innocence, and praying that the sacramental bread might choke him if guilty of falsehood.

† '*Wager of Law*' was, when the defendant, instead of trying his cause by witnesses of the facts, before a jury, swore solemnly in court that he was in the right, and procured a certain number of other persons, *to swear that they believed him*, upon which he was acquitted without further inquiry. The non-professional reader will be surprised to hear, that this mode of trial was nominally in force till the year 1833, when it was abolished by stat. 3 & 4 Will. IV. c. 42, § 13.

clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone: and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king, by a grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest laws are now mititgated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game laws, now arrived to and wantoning in its highest vigour; both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference, that the forest laws established only one

mighty hunter throughout the land—the game laws have raised a little Nimrod in every manor.*

3. A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the original jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected, and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language.† A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till king Edward III. obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era of refinement and subtilty. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and

* The game laws are greatly altered and improved by recent enactments.

† This statement must be qualified. The oral pleadings were in Norman French; but the writs, records, and judgments were in Latin.

manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed, were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial; but which serves no other purpose, than to show the vast powers of the human intellect, however vainly or preposterously employed.—Hence law in particular, which, being intended for universal reception, ought to be a plain rule of action, became a science of the greatest intricacy: especially when blended with the new refinements engrafted on feodal property; which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede, as they did in great measure, the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the

endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of a metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for aliention; the genuine consequences of the maxim then adopted, that all lands in England were derived from, and *holden*, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, and ambitious, and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole farrago of superstitious novelties which had been engendered by the blindness and corruption

of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy curfeu. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And to crown all, as a consequence of the tenure by knight service, the king had always ready at his command an army of sixty thousand knights or *milites*, who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure, some points of their ancient freedom. All the rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility,

it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. But his brother and successor, Henry I. found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring, as our monkish historians tell us, the laws of king Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary fruits of his feudal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the curfeu; for, though it is mentioned in our laws a full century afterwards, yet, it is rather spoken of as a known time of night, so denominated from that abrogated usage, than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, that of theft being made capital in his reign, and a few things relating to estates, particularly as to the descent of lands; which being by the Saxon laws equally to all the sons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the

eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops, and mitred abbots; reserving however these ensigns of patronage, *conge d'eslire*, custody of the temporalties when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognisance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry II., if not earlier, the charter of Henry I. seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodise the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the I., it carries a manifest superiority. Throughout his reign also was continued the important struggle of which we have had occasion so often to mention, between

the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward I.; when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry II, there are four things, which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*, the king having divided the kingdom into six circuits, a little different from the present, and commissioned these new created judges to administer justice, and try writs of assize in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which, in

process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land-tax of later times.

Richard I., a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour; which occasioned many discontents among his people: though, according to Matthew Paris, he repealed the penalties of loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover, that, as an island, we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre; the king's thoughts being chiefly taken up by the knight-errantry of a croisade against the Saracens in the Holy Land.

In king John's time, and that of his son Henry III. the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *magna charta* and *charta de forestâ*. Of these the latter was well calculated to redress many grievances and encroachments of the crown, in the exertion of forest law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively, and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable

amercements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children: it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands.* In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbad the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquest for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer: and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all

* An *appeal* was a criminal proceeding, which might be instituted by one private individual against another. It is now wholly abolished.

other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter), it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here than he ever had before enjoyed; which continued through the long reign of his son Henry III.: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings. Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III.: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The THIRD commences with the reign of Edward I.; who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations: but the principal may be reduced under the following general heads:—1. He established, confirmed, and settled, the great charter, and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of

ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business: to do which they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors; confining them to causes of no great amount, according to their primitive institution, though of considerably greater, than by the alteration of the value of money, they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect of fines * levied in the Court of Common Pleas, though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute

* *Fines* and *Recoveries* were fictitious suits at law, by means of which an estate which had been *entailed*, (i.e. conveyed in such a way as to descend inalienably from the father to son, so as never to pass out of one particular family,) might be set free and rendered alienable. This was done by pretending that some person, who had a better title to it than the family on which it was entailed, had recovered it from that family by a suit at law, and agreed to hold it for the benefit of those to whom it was desirable to transfer it. These fictions are, however, now abolished, and a simpler mode of setting entailed estates free is provided by a recent Act of Parliament. Note by JOHN WILLIAM SMITH [A.D. 1836].

of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit;* which was of signal benefit to a trading people; and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant,* to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulf, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but, in great measure, of the laws of England, which was thoroughly completed in the reign of Henry VIII.; and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I might continue this catalogue much further; but upon the whole we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign,

* This was a kind of bond.

and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least were so till the alteration of tenures took place. And, to conclude, it is from this period, from the exact observation of *magna charta*, rather than from its making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

I cannot give a better proof of the excellence of his constitutions, than that from his time to that of Henry VIII. there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of substance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward III. the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general; for, in particular, it enlarged the credit of the merchant, by introducing the statute staple, whereby he might the more readily pledge

his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire* for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century; though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry VII. the civil wars and disputed titles to the crown gave no leisure for farther juridical improvement: "*nam silent leges inter arma.*"—And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of common recoveries: * invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward IV. for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of USES, another of the clerical inventions.†

* See note *ante*, p. 675.

† *Uses* were invented by the craft of the regular ecclesiastics; who, being prohibited by the statutes of mortmain from acquiring property in land, hit upon this mode of possessing themselves of all the benefits attendant upon the ownership of landed property, without infringing the statutes which forbade them from becoming its actual proprietors. They

In the reign of king Henry VII. his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in

induced those devout persons who were anxious to barter their estate for masses, requiems, and benedictions, to convey it to certain lay persons who became nominally the owners of it, but in reality agreed to hold it for the benefit and *use* of the monastic body, whom the last owner was desirous to endow; and though the courts of common law refused to recognise such an agreement, which was, in point of fact, a gross evasion of the statute law of the realm, it nevertheless was recognised by the Court of Chancery; which in those times was always presided over by an ecclesiastic, and was enforced by a process entitled the writ of *subpœna*, invented for that express purpose by John Waltham, Bishop of Salisbury, and chancellor to King Richard the Second.

An *use* was, therefore, a right to have the profits of land, the bare possession of which was in another person.

These *uses* were soon found exceedingly convenient to the lay as well as the ecclesiastical part of the community. For the *use* or right to have the profits, being quite different and distinct from the land itself (since one man might have the land, and another the *use* or right to the profits), did not subject its owner to those grievances which the feudal system imposed upon the proprietors of land: such for instance as *aids*, *marriages*, *primer seisins*, *fines*, *reliefs*, and *wardships*; and, therefore, for the purpose of escaping these inflictions, it became very common for purchasers of land to have it conveyed to some third person or persons for their *use*, by which means they escaped the burthens, while they secured the benefit attendant upon landed property.

This was, as will be easily believed, very disgustful to the king and the great feudal lords, who found their dues evaded and their victims withdrawn from their grasp, by this species of half-legal, half-ecclesiastical legerdemain. They therefore determined to eradicate the contrivance, root and branch; and for this purpose, in the reign of King Henry the Eighth, they procured a statute to be passed, entitled the *Statute of Uses*, by which it was enacted, that whenever one man gave land to another for the *use* of a third person, that third person should, instead of having only a right to the profits, become the actual owner of the land itself; so that by this statute, the persons who had previously had only the use or a right to the profits of land found themselves turned into its actual proprietors, and brought as such within the clutch of that feudal tyranny which they had so cunningly attempted to avoid. However, they were soon rescued, and the object of the king and lords completely frustrated, by a decision of the courts of law; who held, in construing this statute, that although, if land were given to A for the *use* of B, B must be now considered as its actual owner; yet, that if one step further were taken, and

framing any new beneficial regulations. For the distinguishing character of this reign, was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however

the land was given to A for the use of B, and B was directed to hold it for the use of C, this last person would not become the proprietor of the land itself, but would have just such a right to the profits as B would have had, before the passing of the statute: and this right C could obtain the aid of the court of chancery to enforce, just as B might have done before the statute. So that, in point of fact, the only real alteration in the law the statute made, was to cause one name more to be inserted in a conveyance of land—for instance, that of C, in the example above given.* The court of chancery indeed did not apply the name of *use* to the beneficial interest of C, but denominated it a *trust*; and the enforcement of these *trusts*, continues, to the present day, to be the most important subject of its jurisdiction.

But the *Statute of Uses*, though it did not effect the end its makers intended, gave rise to other very important results; for the conveyancers, a race of men quite as astute as the monks, soon found that they could render it conducive to an object at which they had long aimed, *viz.* that of concealing the transfers of property, which they were in the habit of making, from public knowledge. To explain this, it is necessary to remind the reader that, during the simplicity of olden times, a transfer of land from one man to another was always accompanied with the ceremony of actually investing the new owner, by taking him to the land, and there, in the presence of all the neighbours, who were called upon to witness the transaction, *enfeoffing* him, i.e. putting him in corporal possession of his new property. So that if a conveyancer advised a country gentleman to mortgage his estate, the gentleman had to go down there, and proclaim his necessities to the whole parish, by delivering up in public his estate to the person who advanced the mortgage money; or else to incur great expense, accompanied with equal publicity, by sending an attorney to perform that ceremony. But when the *Statute of Uses* had directed that every person entitled to the *use* or profits of land should be, in law, the actual owner of the land itself, it soon struck the conveyancers that they had nothing to do but to make the seller or mortgagor of lands agree to hold it *for the use* of the buyer or mortgagee, and that the statute would instantly make the latter the actual owner, without any journey to the country, or any cor-

* "It was not, perhaps, much to the credit of the times that such a distinction was ever made: and as Lord Hardwicke said, thus this act of parliament, which was passed with the utmost seriousness and deliberation, by this construction had no other effect, than *to add three words to a conveyance!*" Per Buller J., *Doe* v. *Staple*, 2 T. R. 700. [*Note by* S. W.]

salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

poral investiture. Acting on this idea, they now, when lands were to be sold, prepared what was called a deed of *bargain and sale*, by which the seller 'bargained' and 'sold' them to the buyer. And this being an agreement to hold them thenceforth for the buyer's use, the buyer became, by the statute of uses, actual owner without any public ceremony, or the intervention of anybody, except the conveyancer. And though there was, it was true, a statute which required that these deeds of *bargain and sale* should be enrolled in the public archives, so as to be accessible to such as would take the trouble of searching for them, still a great deal of secrecy was obtained, for the execution of the instrument was managed in the utmost privacy: and the conveyancers soon invented a means of accomplishing the transfer by two instruments called a *lease* and *release*, which conveyed the ownership of the land as well as a *bargain and sale*, and did not, like the *bargain and sale*, require enrolment. And in this mode were lands usually transferred, whether by way of sale or mortgage, from one man to another, [till the year 1845; since which a simple deed of grant is a sufficient, and the usual mode of conveying the freehold, or feudal seisin of all lands. Stat. 8 & 9 Vict. c. 106, § 2.].

From the above account it will be seen how indissolubly connected are the studies of English law and English history. We have just observed the ambition of the priesthood inventing a system for their own peculiar aggrandisement, which has been adopted by the lawyers, first as a means of evading feudal tyranny, and afterwards of carrying the most ordinary arrangements of every-day life into effect; while the attacks made on this system by the monarch and the aristocracy have resulted in the creation of one of the most complicated and extensive branches of the jurisdiction of the court of chancery.—JOHN WILLIAM SMITH, A.D. 1836].

IV. This brings us to the FOURTH period of our legal history, viz., the reformation of religion, under Henry VIII., and his children, which opens an entire new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to ecclesiastical polity completely restored.

With regard also to our civil polity, the statute of wills, and the statute of uses (both passed in the reign of this prince), made a great alteration as to property: the former, by allowing the devise of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which, notwithstanding they may differ in forms, are now equally adopted by the courts of both law and equity. From the statute of uses, a remarkable alteration took place in the mode of conveyancing: the ancient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private inventions of transferring property by secret conveyances to uses, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates-tail; the establishment of recognisances in the nature of a statute staple, for facilitating the raising of

money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to reassume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished era in the annals of juridical history.

It must be however remarked, that, particularly in his later years, the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments. one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of an amazing heap of wild and new-fangled treasons. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, many salutary and popular laws, in civil matters, were made under her administration: perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which were, through the providence of God, defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being, by that happy

event, established, we trust, on an eternal basis (though obliged, in their infancy, to be guarded against papists and other non-conformists, by laws of too sanguinary a nature); the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward I., without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked that the spirit of enriching the clergy and endowing religious houses had, through the former abuse of it, gone over to such a contrary extreme that the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining statutes*, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions, by affording them the means, with proper industry, to feed and clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished,

riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliament at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals, but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit: but at the same time it is sufficient to show, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, surely the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power of the sovereign.

The great revolutions that had happened in manners and in property, had paved the way, by imperceptible, yet sure degrees, for as great a revolution in government; yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of

individuals, were little regarded or thought of; nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing, and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass, and the consequent discovery of the Indies; the minds of men thus enlightened by science, and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves,) and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound; while the king by the spoil of the monasteries and the great increase of the customs grew rich, independent, and haughty; and the commons were not yet sensible of the strength they had acquired, nor

urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative, to which they had been so little accustomed: much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry VIII. were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative, as it then stood by common law, (and much more when extended by act of parliament,) being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry VIII. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

On the accession of king James I. no new degrees of royal power were added to, or exercised by, him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported; and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitations of suits, and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

Indeed, when Charles I. succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in

time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was extremely great; though their usurped authority was still greater. And, if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money, and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feodal tenures: though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befal a prince. Though he had formerly strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A

conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed, therefore, with the success they had gained; fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the people) began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed: the most promising and sensible whereof (such as the establishment of new trials, the abolition of feodal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, viz. after the restoration of king Charles II. Immediately upon which, the principal remaining grievances, the doctrine and consequences of military tenures, were taken away, and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony And though the monarch, in whose person the regal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the conquest. For therein not only the slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from

imprisonment was obtained, by that great bulwark of our constitution, the *Habeas Corpus* act. These two statutes, with regard to our property and persons, form a second *Magna Charta*, as beneficial and effectual as that of Runnymede. That only pruned the luxuriances of the feodal system; but the statute of Charles II. extirpated all its slaveries; except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna Charta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *Habeas Corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties: the abolition of the writ *De Hæretico Comburendo;* the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestate estates, and that of amendments and *jeofails*, which cut off those superfluous niceties which so long had disgraced our courts; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of king Charles the Second." *

* [Mr. Fox withheld his deference to Blackstone (whom, however, he declared to be, in respect of style, as much distinguished for purity, simplicity, and strength, as any writer in the English language), as a constitutional

It is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this; that by the law, as it then stood, (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the rest more clearly defined,) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the LAST period of our legal history; viz.

VI. From the Revolution in 1688 to the present time. In this period many laws have passed; as the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms: have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned

authority, chiefly because of this sentence: "asserting the latter years of the reign of Charles II. to have been the most constitutional period to be found in our history,—not excepting any period that followed." The justice of this remark must be determined by the competent reader, for himself.]

into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have, by the desire of his present majesty, set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have, by the like desire, made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the Riot Act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

The chief alterations of moment (for the time would fail me to descend to *minutiæ*) in the administration of private justice during this period, are the solemn recognition of the Law of Nations with respect to the right of Ambassadors; the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *Mandamus*, and informations in nature of *Quo Warranto*; the regulations of trials by jury, and the admitting witnesses for prisoners upon oath; the farther restraints upon

alienation of lands in mortmain; the annihilation of the terrible judgment of the *peine forte et dure;* the new and effectual methods for the speedy recovery of rents; the improvements which have been made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes; the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and, which is much the better plan, the reformation of county courts; the great system of marine jurisprudence, of which the foundations have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to peculiar cases; * and, lastly, the liberality of sentiment, which, though late, has now taken possession of our courts of common law and induced them to adopt, where facts can be clearly ascertained, the same principles of redress as have prevailed in our courts of equity from the time that lord Nottingham presided there. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century.

Thus, therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our inquiries, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and

[* This was a compliment to Lord Mansfield.]

are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward I.; and have not been much varied, nor always for the better, since; that our religious liberties were fully established at the Reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained till after the restoration of king Charles, nor fully and explicitly acknowledged and defined, till the era of the happy revolution. Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due;—the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright and noblest inheritance of mankind.

CONTINUATION TO THE YEAR 1825, BY THE HONOURABLE MR. JUSTICE COLERIDGE,* ONE OF THE PRESENT [A.D. 1855] JUSTICES OF THE COURT OF QUEEN'S BENCH.

I WISH it were in my power to finish this sketch of our legal history in the same faithful and spirited manner in which the author has begun and carried it down to his own time. Since the year 1780, in which he died, the legislature has provided ample materials for one who saw things in so liberal and comprehensive a spirit, and arranged them in such striking and lucid order. In regard to legal and judicial matters, he might have pointed out the restraint imposed on the arrest of the person, and the right given to a discharge on making a deposit with the arresting officer; the assistance afforded to inferior courts by arming them with the process of the superior where necessary; the prevention of delay in the trial of misdemeanors, and the salutary increase of severity in their punishment; the great diminution of the number of capital offences, and the necessary and wise addition made to the severity of substituted and inferior punishments; the making capital certain aggravated attempts at murder, and the simplifying the trial of certain enormous treasons; the abolition of many punishments, as that of the pillory and the burning or whipping of females: and of the barbarous and shocking parts of others, as that of embowelling in treason; the suppression of appeals in treason, murder, or felony, and of the trial by battle in civil suits; the taking away corruption of blood, except in cases of treason or murder; the provision for the expenses of prosecutions in felony, and for the care and disposal of lunatic offenders; the great improvements in the systems of gaols and houses of correction; the declaration of the functions of the jury in the case of libel; the regulation of the ecclesiastical courts; the trial and punishment of offences committed on the high

* Extracted from his edition of the Commentaries.

seas, or in the colonies; and last, not least, the revision and consolidation of the laws, which regulate that great bulwark of our liberties, the trial by jury.

As measures calculated to secure the integrity of the representative body, Sir W. Blackstone would probably have noticed the act of securing the independence of the Speaker, those which prevent public contractors, and certain public officers, from sitting in the House; which suspend or remove bankrupt members from their seats; and prohibit persons filling offices in the revenue from voting at elections.

In matters of general or internal polity, he would have pointed out the formation of a regular system and jurisdiction for the punishment, as well as relief of insolvent debtors; the many amendments, and finally the consolidation of the bankrupt law; the great diminution of the disabilities of Roman Catholics and dissenters; the liberal alterations in the spirit of the navigation laws; the attempts to estimate accurately the increase of population by a census taken at stated intervals, and a more careful keeping of parochial registers; the sensible and humane attempts to modify and improve the poor laws; the protection and encouragement afforded to friendly societies, and the institution of banks for the savings of the poor; the grand measure of the Union with Ireland; the honest renunciation of the slave trade for ourselves, and the sincere and repeated endeavours to procure its abolition by all other nations.

These might form some of the features of the picture with which the Commentaries might have closed, if they had been written in the present day; the system is still imperfect, and many things remain to be done, which the author might, perhaps, have suggested with something of judicial authority. Without thinking myself entitled to do so, I may venture to express not only my wishes for the gradual perfecting of the English laws and constitution, but my strong conviction, that they will continue to be improved with the increasing lights of the age. It is our

great blessing to have the machinery of improvement always ready to work, in a legislature which, though almost permanently sitting, is yet drawn from the general body of the people, forms part of it, mixes in all its businesses and amusements, and is acted upon by all its hopes, fears, and interests. The very facility of legislation perhaps leads to inconvenience in the multiplying of laws, and in provoking attempts to remedy inconveniences which must be borne, or prevent evils which the unassisted prudence of individuals might more wisely be left to guard against. But these are comparatively slight evils, not counterbalancing the great good of possessing a power of improvement perpetually advancing with the age. It becomes not the commentator on the laws to indulge in a spirit of indiscriminate approbation; perhaps it was the leaning of Sir W. Blackstone's mind to take too favourable a view of his subject, a more excusable failing than the opposite one of a captious and querulous spirit; but I think he might have reasonably indulged the conviction which I have expressed above, because the characteristic of the legislature for the last fifty years has been a sincere desire of general improvement; and a particular zeal for the bettering the condition of the lower or unfortunate classes of society. Fewer measures, purely aristocratic, have passed into laws than heretofore; while no proposition has been coldly received, that was sensible in its details, and had for its object the reformation of the criminal, the instruction of the ignorant, the dissemination of sound religion, the vindicating the rights of the oppressed, or the gradual advancement of the labouring and mechanic orders of the population.

[CONTINUATION FROM THE YEAR 1825, TO THE YEAR 1836, BY THE LATE JOHN WILLIAM SMITH, ESQUIRE, BARRISTER AT LAW.]

THE few years which have elapsed since the above sentences were penned by the learned annotator, have given birth to more and greater changes in the English law, than

are comprised in any entire century of its previous existence. At the head of these statutes which have produced important alterations in the CONSTITUTION, is the act emancipating his Majesty's Roman Catholic subjects from the disabilities under which they formerly laboured. Next in order are the statutes for amending the representation of the people in Parliament; which, by withdrawing the elective franchise from some classes, extending it to many others, altering the method of election, and prescribing means for ascertaining the qualifications of electors, has wrought a great and organic change in the legislative system of this realm.

Among the enactments peculiarly affecting our COLONIAL interests, must be distinguished the act which prohibits slavery throughout the British empire, providing at the same time compensation for those whose property is injured by the consequences of that measure; the statute which provides a judicature for our West India colonies, and that which regulates the future government of British India, the care of which is still entrusted to the Company—stripped however of its commercial privileges; while the natives of that vast peninsula are allowed much more extensive capacities than they have heretofore enjoyed under our empire, and the trade with China is thrown open to the competition of all his Majesty's subjects.

Among the important changes in our DOMESTIC POLITY, must be pointed out the Act of Municipal Reform, which has popularised and remodelled the various municipal corporations throughout the kingdom, with the exception only of the metropolis; the act for the amendment of the Poor Laws, which, by confiding the administration of those laws to a central board, and accompanying the relief afforded to the indigent by circumstances which render it far less desirable than formerly, has tended, whether wisely or unwisely, to deter the applicant, unless impelled by actual and pressing need, and to diminish the burden upon those classes who contribute to the fund destined for the relief of

their indigent fellow subjects: the abolition of the Palatine peculiarities of the county of Durham; the Tithe Commutation Act, which has enabled persons anxious to exempt their lands from the payment of that species of ecclesiastical contributions to do so upon equitable and advantageous terms of compromise; the alteration in the law of Marriages, effected to relieve the scruples of the dissenting classes of our population, and which points out a mode in which the matrimonial contract may be solemnised without the intervention of the Church of England; the erection of a general registry for Births, Deaths, and Marriages, by which it is hoped that the memory of such events will be preserved more faithfully than heretofore; and the general Highway Act, providing a new system for the management of our great national thoroughfares.

Among the acts designed to benefit the COMMERCIAL INTERESTS of the nation, may be reckoned that which renews the Charter and defines the privileges of the Bank of England; that which erects a new tribunal denominated the Court of Bankruptcy, for the administration of that important branch of commercial law; the improvements effected in our maritime code by the alteration in our navigation and ship-registry acts, the consolidation of the custom laws, and the act passed for the regulation of our merchant seamen; the partial abolition of the Usury Laws, whereby bills and notes having no more than three months to run, may be negotiated at any rate of interest; the improvement of our law of Patents, which encourages the enterprise of inventors by affording additional protection to their ingenuity; that which settles the general standard of Weights and Measures; that which defines the liability of Common Carriers, and that which enables his Majesty to bestow on trading companies several important privileges which heretofore could only have been conferred by the transcendent authority of parliament.

Among changes respecting the GENERAL ADMINISTRA-

TION OF THE LAWS, may be enumerated, the alteration of the amount for which a debtor may be legally arrested from the sum of ten, to that of twenty pounds; the act which sweeps away the old intricate system of process, and substitutes an easy and intelligible method of commencing actions in the courts of common law; the Law Amendment Act, which destroys several antiquated forms, expedites and cheapens the trial of causes of slight importance, enables the judges to amend and obviate technical errors, arms them with a power which they have not been slow to exercise, of introducing regulations calculated to render our system of pleading more effectually subservient to the ends of justice, and renders more efficient the tribunal of the arbitrator; the consolidation of the Welsh and English Judicatures; the appointment of an additional Judge to each of the superior courts: the act dispensing with a number of useless oaths, the multitude of which tended to induce disregard of those most solemn invocations of the Deity, by rendering their use too frequent in matters of trivial importance; the destruction of the numerous and antiquated tribe of Real Actions, and the remodelling of the Court of Privy Council for judicial purposes.

Among enactments concerning THE REGULATION OF PRIVATE PROPERTY, may be enumerated, the act which renders a man's real property liable after his death to the claims of all his creditors; the acts which ascertain the period at which rights and titles shall be rendered secure by lapse of time and uninterrupted continuance of possession; which define the right of the wife to dower out of her husband's, and that of the husband to curtesy, as it is called, out of the wife's, real property; which alter the law of descents, by allowing the parent to inherit to the child, and letting in the half-blood, who were formerly excluded by an arbitrary rule of feudal policy; and that which substitutes easy and simple forms for the complicated and abstruse ones of fine and recovery.

Lastly: our CRIMINAL LAW has been improved by the abolition of the disabilities under which Quakers and Moravians formerly laboured of giving evidence for or against the prisoner. The statutes which composed its bulk have been consolidated; the punishment of death abolished in numerous instances; and the accused has at length obtained the right, heretofore denied him in prosecutions for felony, of making his full defence by counsel, and inspecting the depositions of those who charged him with the crime for which he stands indicted.

These are the most prominent of the alterations which have, within the last ten years, been effected in the English law and constitution. Experience will probably show, that, like other human institutions, they contain good mixed with evil. But the very experience which detects the latter, will help to point out the true method of correcting it; while the continuance of the former may, and let us trust will, be insured, by that willing obedience to existing laws, that steady attachment to the constitution, that charity to fellow subjects, and loyalty to the crown, which have ever remarkably distinguished the English people.

[CONTINUATION FROM THE YEAR 1836, TO THE YEAR 1856, BY SAMUEL WARREN, D.C.L., ONE OF HER MAJESTY'S COUNSEL.]

[IT were to be wished that the changes in our laws effected during the last twenty years, and throwing into the shade those of several centuries recorded in our annals, could have been reviewed by an eye so discriminating, and delineated by a pen so masterly, as those of Sir William Blackstone. There is a special reason for exhibiting a faithful picture of legislation during this interval; that it follows, and is largely due to, the energy and activity infused into the legislature, by the acts passed in the year 1832, for amending the representation of the people. As in all great changes, the one in question was inaugurated with

sanguine predictions of good, and confident forebodings of evil. It is for the impartial chronicler of our laws and institutions, to afford an opportunity for judging how far events have justified the hopes and fears of those respectively favouring, and deprecating, so great and sudden a strengthening of the democratic element in our constitution. The change in question has already gone far towards verifying the prediction of one of its responsible promoters,* that it must 'influence the character of the government and the legislature in all future times, and impress its influence on the whole frame of society.' A consideration of what has been done and attempted, since the year 1832, suffices to remind us that activity and energy in the legislature, must be associated with prudence, moderation, and forethought, in order to secure the enduring results of bold and beneficial legislation.

Glancing for a moment abroad, we behold acts continually passed by our legislature for the purpose of carrying into effect conventions with FOREIGN states for suppressing the Slave Trade; and with France and the United States of America, for apprehending, in any of the three countries respectively, persons charged with murder attempts to murder, robbery, piracy, forgery, or fraudulent bankruptcy. Other acts are for consecrating British subjects, or foreigners, to be Bishops in foreign countries; securing, to some extent, the benefit of international copyright; facilitating the marriage of British subjects in foreign countries; and the naturalisation of foreigners here.—Her majesty has also been empowered to establish and maintain diplomatic relations, and to hold diplomatic intercourse, with the Pope; but not through the intervention of a person in holy orders in the church of Rome, or a Jesuit, or member of any Romish order or society bound by monastic or religious vows; and it is also expressly provided that nothing in that

* Hansard, vol. 2, col. 1318, 9 (3rd Ser.), Viscount Palmerston.

act is in any way to repeal, weaken, or affect the royal supremacy, civil and ecclesiastical.—Our commercial relations with foreign countries have undergone a total change, by the great relaxation of our system of prohibitory and protective duties, especially in respect of the importation of animal and vegetable produce from foreign countries; the abandonment of our navigation laws, so long deemed the bulwark of our national greatness, and the admission of foreign shipping to the privileges of our own, even to the coasting trade; while an attempt has been made to secure corresponding advantages from foreign states, by arming her Majesty with retaliatory powers, to be exercised when it may be deemed expedient.

Our COLONIAL relations are the subject of constant solicitude to the mother-country; with a view of conferring on our colonies the rights and privileges of self-government, the representative system, and free institutions, under such conditions as may be thought likely to preserve and perpetuate on terms consistent with the dignity and advantage of both, the connection between the two. For this purpose the imperial legislature is often occupied, in framing and remodelling the constitution of her colonies, in accordance with novel exigencies, as in Australia. Yielding to the urgent and reasonable objections of some of the more distant, to being continued penal settlements, we have greatly diminished the number of offenders liable to transportation, substituting principally, in such cases, penal servitude at home or elsewhere. Importing counterfeit coin into the colonies has been made heavily punishable; persons charged with treason or felony, in either the mother country or the colonies, and escaping from one to the other, may now be apprehended in either, and secured, for transmission to the scene of the offence, there to be dealt with according to law. Unsworn evidence has been made admissible in divers colonial courts, from necessity, in the case of neighbouring barbarous and uncivilised people, ignorant of the existence of

God, or a future state. A great multitude of acts have been passed for regulating the commercial intercourse between ourselves and our colonies; local courts of appeal have been established in some of the West India colonies, and facilities afforded for the sale, in others of them, of encumbered estates. But above all, the legislature has evinced a benign anxiety to extend the blessings of the United Church of England and Ireland to our colonies, whenever an opportunity is afforded. There are now established twenty-nine bishoprics in our colonies; and provision is made for strengthening and consolidating ecclesiastical arrangements throughout our wide-spread dominions. The government of our stupendous Indian possessions has lately been placed upon a new footing, and the legislature is continually striving to promote education, secular and religious, and reform the laws, and improve the administration of justice there.

Returning to the United Kingdom, we shall find changes of great importance effected in every department of our DOMESTIC ECONOMY. The links which bind the three kingdoms together, are constantly strengthened and multiplied, by acts having for their object to assimilate, as far as practicable, the laws in force in each. The great measure for facilitating the sale of encumbered estates in Ireland, is one of the boldest legislative interferences with rights of private property, ever attempted in this country, by which the land of Ireland has been rendered again freely alienable, and a great portion of it has changed owners.

Foremost among acts of high interest and importance are those, at the commencement of the present reign, for the support of her majesty's household, and of the honour and dignity of her crown; by which, following the example of her immediate predecessors, she caused her hereditary revenues to be unreservedly carried to, and made part of, the consolidated fund. And in the fifth year of her reign, her majesty graciously signified to parliament her wish to submit her royal income to the burthen of the

income tax imposed on her subjects. Other acts effected the naturalisation of, and made provision for, her royal consort, and for his filling the office of Regent, should the necessity arise. It also became necessary to provide for the further security and protection of her majesty's person, in consequence of some outrages perpetrated by half-crazed candidates for notoriety; and for the better security of the crown and government of the United Kingdom, because of certain public disturbances of a malignant character; declaring divers heinous acts of a treasonable character, to be nevertheless punishable, not as treason, but felonies, with transportation or imprisonment.

Great improvements have been made in the laws relating to the CONSTITUTION OF PARLIAMENT; the time and mode of assembling it; a third principal, and a third under secretary of state, are now empowered to sit and vote in the house of commons, but not more than three of the former, and three of the latter, at the same time; * an entirely new code of laws has been enacted for conducting elections, and putting down bribery, corruption, and undue influence. Other acts allow members to qualify in respect of either real or personal property, or both; repeal certain severe penalties and disabilities; appoint the Court of Common Pleas the tribunal for finally determining questions of disputed election law; greatly improve the constitution of Election Committees; and reduce restrictions on the exercise of the franchise. Acts of parliament have been simplified and shorn of much verbiage; parliamentary proceedings are diffused widely throughout the empire, at a very small cost; and certain immunities granted to Parliament, by way of privilege, in respect of such as may happen to involve matter challengeable in respect of its libellous character.

Our NAVAL AND MILITARY laws have been improved in various ways, particularly by limiting the period of enlist-

* Stat. 18 & 19 Vict. c. 10 [16th March, 1855].

ment and service, and making liberal and salutary provisions in respect of bounty and extra-pay, in order to increase the inducements for entering the public service; the militia laws have been revised, consolidated, and placed, in some respects, on a new footing.

The interests of RELIGION, AND RELIGIOUS LIBERTY have received a large share of the anxious solicitude of the legislature. It has made powerful and unwearied efforts to diffuse religious knowledge: to develope the vast capabilities of the United Church of England and Ireland; building churches and chapels in spiritually destitute districts; altering ecclesiastical districts; remodelling dioceses; uniting and severing benefices; re-distributing revenues, episcopal and capitular; establishing stipendiary curacies; abolishing commendams; vesting the patronage of deaneries in the crown; creating a new tribunal for enforcing church discipline among the clergy; prohibiting the desecration of churches by holding in them vestry meetings, or for any other than religious purposes, and the reading of public secular proclamations or notices, during divine service; for which are substituted printed or written copies attached to the outer door. The sanctity of the sabbath has been promoted by prohibiting the opening of houses and places of public resort, and public houses, on Sunday, except within certain hours, throughout England and Wales, and in Scotland during the whole of Sunday, except for the accommodation of lodgers and travellers. In consequence of the Pope's affecting, in the year 1850, to parcel out this kingdom into provinces and dioceses, and appoint archbishops and bishops, which occasioned an extraordinary ferment, the assumption, unauthorised by law, of the name of archbishop, bishop, or dean, of any place in the United Kingdom, is prohibited; briefs, rescripts, and letters apostolical, from the See of Rome, are declared void; and those publishing and assuming to act under them for the purpose of constituting such offices, provinces, sees, or

dioceses, are liable to penalties.—A great number of statutes inflicting disabilities, penalties, and forfeitures on Roman Catholics, Jews, and dissenters, but which had long ceased to be enforced, have been repealed; and many enactments passed facilitating the exercise of their religious rights, and stringently guarding against any invasion of them. Dissenters, and indeed all persons professing to entertain conscientious objections, of a religious nature, to taking oaths, may now, in lieu of them, make solemn affirmations or declarations, in courts of justice and elsewhere.

Indefatigable efforts have been made by the legislature to promote the cause of EDUCATION, especially among the humbler classes of society, by establishing and affording support to parish and other schools; by giving facilities for conveying land, to form sites for schools, for the education of poor children, and other schools partly charitable and partly self-supporting; large annual grants are made by parliament, to be applied at the discretion of her majesty in council, for the purpose of education, without preference to any particular religious denomination. The subject of popular education, under state auspices, however, is one so difficult, with reference to its secular, religious, and compulsory character, as thus far to have baffled the praiseworthy efforts of all parties in the legislature to solve that difficulty.—New colleges have been established in Ireland; and the Universities of Oxford and Cambridge have been subjected to great changes of their constitution and powers, with a view to promotion of good government, extension, abrogation of oaths, and maintaining and improving discipline and studies. Other colleges, some of them formed into an university, have been established in the metropolis and elsewhere, the members of which are entitled to the substantial rights and privileges, especially with reference to entering the learned professions, of legitimate academical education.—A permanent board, whose powers are being now increased by parliament, has been

established for the better administration of CHARITABLE TRUSTS, and the better application of charitable funds in England; than which few measures in recent years are likely to be attended with such great and permanent advantages, in averting the evil consequences of supineness, negligence, and malversation.

In order to promote the RATIONAL ENTERTAINMENT AND INSTRUCTION OF THE PEOPLE, town councils have been empowered to establish public libraries and museums; and an act has been passed to afford greater facilities for establishing institutions to promote literature, science, and the fine arts, or the diffusion of useful knowledge; and making effectual provision for improving the legal condition of such institutions. To encourage habits of PRUDENCE, FORETHOUGHT, and ECONOMY, various acts perfect and promote loan, benefit, building, friendly, industrial, and provident societies, but with precautions against abuse. While thus caring, however, for the religious, moral, and intellectual welfare and advancement of the people, the legislature has been equally anxious concerning their material interests, by promoting the HEALTH, CLEANLINESS, and COMFORT of all, but especially the humbler classes; and in doing this they may be thought to have pressed the maxim, *sic utere tuo ut alienum non lædas*, to an extent which might have surprised our ancestors. Measures of extreme stringency have been taken, and are now in full force, for suppressing nuisances in respect of sewers, drains, privies, slaughter-houses, offensive trades, callings, and manufactures; stench and smoke; for preventing the spread of contagious or infectious diseases, either existing in this country, or likely to be imported from abroad; for compelling vaccination as a protection against small-pox; for preventing the spread of contagious or infectious diseases among sheep, cattle, and other animals. A central and local boards of health are now established, and in vigorous action, for the purpose of improving the sanitary condition of the country. Burials in churches

and chapels, or in burial-grounds in populous places, are prohibited.

Various acts encourage the establishment of public baths, wash-houses, and open bathing-places; of well-ordered lodging-houses, for the labouring classes, as desirable for the health, comfort and welfare of the inhabitants of towns and populous districts; for the well-ordering of common lodging-houses, as tending greatly to the health, comfort, and welfare of many of her majesty's poorer subjects; requiring such lodging-houses to be registered, inspected, and cleansed; and notice given to the authorities of any person in them ill of fever, or any contagious or infectious disease.

Our POOR LAWS have been remodelled, and their administration, in a humane and just spirit, placed on a very satisfactory footing, under the constant superintendence of a high and responsible central authority; prison discipline has been similarly dealt with, and subjected to systematic and vigilant inspection, with a view to securing its efficiency not only as a punishment, but as far may be, a preventive of crime; and also protecting prisoners from oppression, neglect, or improper treatment of any kind; while infinitely beyond and above all, the legislature has bestirred itself to lay the axe at the root of the Upas tree of CRIME; endeavouring to secure the reformation of offenders, especially of the young; and destroying ignorance, and intemperance, the twin roots of that accursed tree.

It has been sought, with sedulous anxiety, to devise means for PROTECTING women from fraudulent practices against their chastity, wickedly practised by infamous persons; WOMEN AND CHILDREN both from injuries and ill-treatment to which they are peculiarly exposed; from aggravated assaults; from neglect and cruelty on the part of their employers; from exposure to serious or fatal injury in dangerous employments; from being employed at all in mines or collieries; from being set to work at too tender an

age, or kept at work too long, in mills, factories, and print-works; for sending children employed in the latter, to school; for preventing frauds on work-people in respect of the payment of their hard-earned wages: and for subjecting such scenes of employment to periodical and searching inspection.

And as relates to the unfortunate class of persons denominated IDIOTS, LUNATICS, or INSANE, many considerate and salutary enactments have been made for the care and custody, and protection of their person and property; for the care of pauper lunatics, the maintenance and custody of insane criminals, the conveyance to a lunatic asylum, of lunatics meditating crime, the removal from India to the United Kingdom of insane persons of European birth charged with offences, but acquitted on the ground of insanity; and for the periodical visitation, by the commissioners in lunacy, of county lunatic asylums, and gaols and workhouses where any lunatics may be confined.

But while thus humanely providing for the safety and welfare of our own species, the legislature has not been unmindful of THE ANIMAL CREATION. Cruelty to them has been visited with new and severe punishment, likely, it is hoped, to check brutal natures insensible to other influences; barbarous sports, such as bull, bear, and badger baiting, dog-fighting, and cock-fighting, have been prohibited; a sufficient quantity of fit and wholesome food and water must be supplied to cattle impounded; and the use of dogs, for purposes of draught, is forbidden.

Our RAILROADS, the gigantic growth of the last quarter of a century, and fast monopolising the means of national transit, with the benefits attached to it, have been placed to a certain extent, under proper control, for the protection of the public, and the due discharge of the public service; and a comprehensive enactment has been passed, defining their duties, and constituting the Court of Common Pleas a final tribunal for enforcing the law thus newly defined.

The interests of AGRICULTURE have not been lost sight of; and foremost in changes vitally affecting it, must be regarded the repeal of the corn laws, and allowing the importation of foreign cattle: in bold reliance on the skill and energy of our own farmers, and on our means of acquiring from abroad, at all times, and under all circumstances, an adequate amount of food, should the domestic supply prove deficient. This is one of those changes which signalise the age in which they are effected, and produce results of incalculable extent and importance.—Excellent measures have been passed for the benefit of agriculture; for facilitating the improvement of land, by drainage, on equitable terms, by those enjoying only limited interests, or under disabilities, such persons first obtaining permission of the court of chancery; and the consent of the occupier; when the expense of so permanent a benefit to the estate, may be charged on the inheritance. Other measures of great importance, relate to the enclosure and improvement of waste lands; the enfranchisement, voluntary or compulsory, subject to certain limitations, of copyholds; and completing the working of the acts for the commutation of tithes;—allowing hares, so injurious to lands, to be killed by the occupier of enclosed lands, or the owner, having the right to do so, or anyone authorised by him, and without paying game duties, or taking out a certificate. The law of landlord and tenant has been improved, by allowing tenants holding under uncertain interests, on the determination of their holding, instead of the ancient claim to emblements, to continue on the land till the close of the current year of the tenancy; authorising the removal of buildings and fixtures set up for agricultural purposes; empowering a landlord to pay the tithe-rent charge left in arrear by his tenant, and recover against him as for a simple contract debt; and to distrain for rent, growing crops, still on the land, though *in custodiâ legis*, as already seized and sold under an execution against the tenant. The transfer of land has been

in some degree simplified; real property subjected fully to the debts of the owner; the transfer of land vested in trustees and mortgagees, facilitated; and the laws of real property amended in important particulars.

The laws relating to our COMMERCIAL interests, have undergone recent and fundamental changes, with the view of removing impediments to the free exercise of mercantile discretion and enterprise. A multitude of acts in restraint of trade, and conferring local and exclusive privileges, and all those relating to the offences, long exclaimed against by political economists, of Forestalling, Engrossing, and Regrating, have been abolished. The Usury laws, after steps taken in that direction for several years, have at length been totally abrogated; and annuities are no longer subject to enrolment. The Navigation laws, as we have seen, are also entirely repealed, and British shipping has now to compete, even in our own coasting trade, with the shipping of all the world; with some provisions for endeavouring to coerce into following our example, foreign countries indisposed to reciprocate our bold and liberal concessions. All acts regulating our MERCANTILE MARINE, from the eighth year of Queen Elizabeth to the eighteenth of Queen Victoria, have been repealed by a single statute in the latter year, and in their stead is enacted a new and comprehensive code, incorporating many improvements, and vesting in the Board of Trade the general superintendence of the mercantile marine. Corporations and other public bodies, moreover, are empowered to grant sites for SAILORS' HOMES, calculated, while providing for their comfort, to elevate their character; and a complete system is established for watching over the welfare of SEA PASSENGERS and EMIGRANTS.

Improvements have been effected in the WAREHOUSING system, by which the importer of merchandise is relieved from paying duty, till he has sold them to a home or foreign purchaser; the rights, powers, and liabilities, civil

and criminal, of FACTORS have been defined, and those of indorsees of Bills of Lading extended; while summary remedies have been afforded, in the case of Bills of Exchange and Promissory Notes. The complex and critical relations between DEBTOR and CREDITOR have been several times adjusted and re-adjusted, by revising and remodelling the administration of BANKRUPTCY and INSOLVENCY law; and provisions are made against secret Bills of Sale. While the arrest of a debtor on mesne process, has been abolished, except under special circumstances, and under the authority of a judge, new remedies are given against absconding debtors; and debts due to a defendant, can now be attached, or taken in execution by a successful plaintiff.

Our BANKING system, including the Bank of England, and all public and private banks, has been placed on a new footing, with a view to securing the circulation, and preventing fluctuations ruinous to the country. JOINT-STOCK COMPANIES have formed subjects of incessant legislation, affecting equally their formation, practical working, compulsory dissolution and winding up, and the rights and liabilities of shareholders among themselves, and between themselves and the public. The CUSTOMS laws have been consolidated and remodelled, in conformity with fundamental changes in our commercial policy. In short, a revolution has been effected in the FISCAL system of the country, with a view to ensure simplicity, certainty, and safety, and the unfettered freedom of self-reliant enterprise. Taxes have been imposed on INCOME and PROPERTY, as the basis of the great changes referred to, but have ever since been continued, and were heavily but temporarily augmented on account of the late war; while a tax has also been imposed on the SUCCESSION to PROPERTY. The STAMP duties have been revised and placed upon a new footing, and those on Newspapers entirely repealed. Our POSTAL system has been remodelled, and postage, both domestic, colonial, and foreign, reduced to low and uniform rates. The law of

PATENTS and COPYRIGHTS has been improved and extended, and valuable rights and privileges conferred in respect of literature, engravings, designs for ornamenting manufactures, machines, and useful inventions; and certain colonial and international rights established in respect of books, translations of them, prints, articles of sculpture, and other works of art.

Acts have been passed for the important object of obtaining a complete GEOLOGICAL SURVEY of the United Kingdom, under the direction of government; an admirable system of REGISTRATION of BIRTHS, DEATHS, and MARRIAGES, has been established, under the control of a registrar-general, whose periodical reports afford information to the country of an authentic, important, and most interesting statistical character; and a Census of the Population was recently taken, on a far more extensive and systematic plan, than had ever before been attempted in this country.

Some of the more important alterations in the SUBSTANCE of the law are to be found in the act for enabling the personal representatives of one whose life has been sacrificed by the wrongful act, neglect, or default of another, though under circumstances amounting in law to felony, to recover damages for the benefit of his family. Another is, that effected in the law of libel, especially in newspapers and periodicals, by Lord Campbell's Act; having for its object the better protection of private character, for the more effectually securing the liberty of the press, and better preventing abuses in exercising it. These objects are attained by means of this valuable act, which is calculated to restrain censorious and malignant pens from publishing libellous matter, which though true, it may not be held to have been for the public benefit, to publish: but lacerating private feeling, and blighting character, only for the gratification of spite and malignity. Full effect is given to a prompt and proper apology, or even offer of one, in the case of haste, passion, or inadvertence; and a sum of money

punishment, those defiling a court of justice by perjured evidence. Oaths are dispensed with, whenever a witness will solemnly pledge his word that he entertains conscientious objections, on religious grounds, to taking them; and powers are given for enforcing the attendance of witnesses, out of the jurisdiction of a particular court, if they be within the United Kingdom.

A question of fact may be referred to the decision of either judge or jury, as shall appear most expedient; and those of fact or law are now easily and economically reviewable by successive courts of appellant jurisdiction. Several pages, however, would be required to indicate the substantial improvements effected in the administration of the common law in the Superior Courts, even by two statutes, entitled the Common Law Procedure Acts, of 1852, and 1854—by which, among other great changes, equitable matter is rendered available by either party in a common law court; which is also armed with powers hitherto wielded by Courts of Equity only, by way of compelling specific performance,—by injunction, discovery, and interrogatories. Inferior civil Courts of Record, existing by ancient charter or act of Parliament, and often possessing extensive jurisdiction, have had their procedure improved and regulated by that of the Superior Courts, as far as applicable, by either express enactments, or the incorporation, by an order of Privy Council, of the two Common Law Procedure Acts of 1852, and 1854, or by powers conferred by act of Parliament on the recorder or judge to regulate practice and pleading, subject to the approval of three judges of the Superior Courts.

Local Courts have been established throughout England and Wales, absorbing a large portion of the jurisdiction, heretofore exercised by the Superior Courts only, who have been, however, compensated, so to speak, by being allowed to encroach, as we have seen, on the Courts of Equity.

Into Courts of Equity have been introduced, also,

changes of number and magnitude corresponding with those effected in the common law courts, and, having the same object; namely, to dispense with superfluous technicality, to shorten prolix pleadings, and simplify procedure in every way, so as to arrive as quickly and inexpensively as possible, at the true merits of a question, and have it as promptly adjudicated upon. Two new courts of primary, and one of appellate jurisdiction, have been erected; the judges are armed with powers, like those of their brethren in the Common Law Courts, for regulating practice; dispatching business at Chambers, as well as in Court, in lieu of the Masters in Chancery, who have been abolished; taking evidence *vivâ voce;* deciding legal questions, rendered necessary for the determination of equitable rights, without invoking the assistance of a court of law; and being deprived of the power any longer of sending cases for the opinion of the latter. This, however, is only a faint outline of the great ameliorations which have recently been effected in our Courts of Equity, of which they have so long stood in need, and which have given great satisfaction to the public.

In the administration of our CRIMINAL LAW may be seen the same bold hand of reform; and salutary changes have been effected, in a spirit at once cautious, humane, and enlightened; before which technical jargon and senseless prolixity have melted away, leaving the Indictment to speak language so plain, as to be intelligible at once to the prisoner and the public, instead of misleading, harassing, and confusing all parties, and tempting chicanery, with facilities for defeating justice. Simple and brief as criminal pleadings are now become, a judge is armed with every requisite power of amendment, on rational principles, and consistently with full justice to the prisoner. Both judge and jury are enabled, better than ever heretofore, to do substantial justice, without discarding proper and necessary forms. While the latter can, without prejudice to the prisoner,

adapt their verdict to the true merits of the case, which the evidence has shown referable to a different class of offence from that charged in the indictment; so the former is enabled to carry that specially adapted verdict into complete effect, and, without unduly enlarging his discretion, apportion punishments, within certain limits, to the quality of the crime, and the character and previous conduct of the prisoner. A new court of appeal has been erected, exactly qualified to answer every object in the administration of criminal justice, by keeping it consistent with the letter and spirit of the law, and affording prompt redress in cases of miscarriage.

Magistrates have been recently invested with greatly increased powers of SUMMARY JURISDICTION, over adult as well as juvenile criminals, to an extent not, perhaps, likely to have been approved of by Blackstone, judging from his recorded sentiments,* though accompanied by provisions aimed at guarding from abuse so great a departure from the precious institution of trial by jury.

PUNISHMENTS have been often and anxiously considered by the legislature, with a view to mitigating their severity, without at the same time affording impunity to crime. This has been done by men inspired by enlightened philanthropy, aiming patiently at the true medium between justice and mercy, and actuated by the spirit breathing in the grand and solemn language of one of our ancient statutes, "The state of every king, ruler, and governor, of any realm, dominion, or commonalty, standeth and consisteth more assured by the love and favour of the subject towards their sovereign ruler and governor, than in the dread and fear of laws, made with rigorous pains and extreme punishment for not obeying of their sovereign ruler and governor: and laws also made for the preservation of the commonweal, without extreme punishment or great

* Chap. LIX. Ante, p. 568.

penalty, are more often for the most part obeyed and kept, than laws and statutes made with great and extreme punishments, and in special, such laws and statutes so made, whereby not only the ignorant and rude unlearned people, but also learned and expert people, minding honestly, are often and many times, trapped and snared, yea, many times, for words only, without either fact or deed done or perpetrated."*

Capital punishments have, accordingly, been expressly abolished in a great number of heinous cases, such as forgery, rape, and certain crimes, foul and revolting; but retained in others deemed of a more dangerous public tendency, and principally of a murderous character, and with such intent committed; as in cases of stabbing, cutting, wounding, poisoning, doing violent injury dangerous to life. Even in these cases, however, the sentence of death is not always carried into effect; while offences of kindred enormity, as by the use of explosive substances, corrosive fluids, chloroform, laudanum, or other stupifying materials, for felonious purposes; and attempting to shoot, drown, or suffocate, are punishable by transportation for life, or for a long series of years, or period of imprisonment.

As already indicated, however, one of the noblest characteristics of the age, is its endeavouring to prevent the commission of crime—to reform and restore an offender, rather than harden and destroy him; and let us close this surprising summary of the legislation of the last twenty years, by saying that the feature of it last brought under the reader's eye, would have lit up with delight that of a Blackstone, and a Coke: the latter of whom, after writing on this subject in moving terms, thus solemnly closes† his Institute of Criminal Law: "The consideration of this "PREVENTING justice, were worthy of the wisdom of a par- "liament, and in the meantime, expert and wise men to "make preparation for the same, as the text saith, *ut benedicat*

* 1 Mary, Stat. 1, c. 1. † Epilogue to the Third Institute, *ad finem.*

"*eis Dominus*. Blessed shall he be that layeth the first stone "of this building: more blessed that proceeds in it: most "of all that finisheth it, to the glory of God, and the honour "of our king and nation." The anxieties of the late war did not prevent the nation from addressing itself to this holy enterprise, and the return of peace beholds it more intent upon that enterprise than ever.

To this glittering catalogue of the accomplished acts of the legislature, during the period with which we are here concerned, may be added a mere passing allusion to measures attempted, but unsuccessfully; proposed and rejected, by either house of parliament, or both; or at this moment occupying the grave attention due to subjects of serious magnitude. Some of the former, if adopted, would have virtually changed our form of government, and in the opinion of the vast majority of the nation, involved us in confusion and ruin. Measures of such a character and tendency have been proposed in, and as peremptorily negatived by, the popular branch of the legislature. Never before was so visible as now, the truth of that apophthegm of the great Lord Burleigh, cited by Blackstone,* that "England could never be ruined but by a parliament," and of the saying of Sir Matthew Hale,† that, "if by any means a misgovernment should fall on it, the subjects of this kingdom are left without all manner of redress." On the moderation, foresight, and patriotism of our remodelled house of commons, now really depend, under Providence the welfare and very existence of our empire. If ever the day shall unhappily arrive, when either of these august Houses has become deficient in respect for the other: no longer exhibiting the dignified deference and forbearance due from two such great legislative assemblies towards each other; and both, or either, careless of their high and delicate relations to the crown; if either become insensible to its glorious

* Ante, p. 126. Chap. XIV. † *Id. ib.*

position and immense responsibilities, our dismayed descendants will read, or we ourselves may be fated to read, inscribed over the portals of our national greatness, ICHABOD! *the glory is departed.** In vain will then be the sagacity of our statesmen, in vain the valour of our warriors, in vain the benignant and equitable sway of an enlightened constitutional sovereign.

The House of Commons, however,—the very focus of the national will and intelligence,—depends, for its character, on those who call it into existence: in other words, on those who exercise the elective franchise. Ours is a land, to use the happy language of an accomplished living judge, "all the institutions of which seek the genial sunshine of PUBLIC OPINION, and must languish without it;" † and the cultivation and right direction of that Public Opinion, is thus of unspeakably momentous concern, and must be sought for in Christianity: whose strengthening and hallowing influence can alone give vitality to our institutions, making us safe and happy among ourselves, and respected by all other nations: "who are now," in the language of one nearest to the throne,‡ "for the first time recognising their "advancement as a common good, their interests identical, "their mission on earth the same. The civilisation "of mankind rests on Christianity; could be raised by "Christianity only; can be maintained by Christianity "alone. The same earnest zeal and practical wisdom which "have made our political constitution an object of admira-"tion to the nations, will, under God's blessing, make her "Church, likewise, a model to the world; wherefore we "relax not our efforts, to extend to those of our brethren "who are settled in distant lands, building up communities "and states where man's footsteps had first to be imprinted

* 1 Sam. iv. 21.

† Mr. Justice Coleridge, *Stockdale* v. *Hansard*, 9 Adolph. & Ell. 242.

‡ Address of H. R. H. Prince Albert, at the third jubilee of the Society for the Propagation of the Gospel in Foreign Parts, 17 June, 1851.

"on the soil, and wild nature yet conquered to his uses, "those blessings of Christianity which form the foundation "of our community, and of our state." These are ennobling sentiments; and their practical influence should be seen in systematic and redoubled efforts, to diffuse, amongst all classes, the blessings of sound, moral, and religious education; regarding the training of the individual as the training of the nation, and setting before us, as in light, the true value and end of our incomparable institutions.—And for a farewell to the reader, as this elementary account of those Institutions, opened with the reverent regard for religion exhibited, in compiling his little code of laws, by the most illustrious of our sovereigns,* so let us now end with a far briefer, but an infinitely comprehensive Code † of Civil and Religious Conduct, dictated by INSPIRATION.

Submit yourselves to every ordinance of man, for the Lord's sake: whether it be to the King, as supreme; or unto Governors, as unto them that are sent by Him for the punishment of evildoers, and for the praise of them that do well. For so is the will of God, that with well-doing ye may put to silence the ignorance of foolish men: as free and not using your Liberty as a cloak of maliciousness,‡ but as the Servants of God. Honour all men. Love the brotherhood. Fear God. Honour the King.

* Alfred the Great. Ante, p. 1. † 1 Peter ii. 13—17.

‡ See the Sermon from these words, preached by Bishop Butler before the House of Lords, containing the fine passage concerning Civil Liberty, which may be found, ante, pp. 112, 113.

QUESTIONS FOR EXAMINATION.

CHAPTER I.—(Pages 1—3.)

CHRISTIAN CHARACTER OF THE LAWS OF ENGLAND.

What relation do the laws of England bear to Christianity?
How did Alfred commence his Doom-Book?
From what two precepts may be deduced the entire code of Christian Jurisprudence?
How does Blackstone illustrate the importance to the Civil State, of the preservation of Christianity?

CHAPTER II.—(Pages 4—14.)

ON A GENERAL ACQUAINTANCE WITH THE LAWS OF ENGLAND.

What does Cicero tell us, concerning the study of law by the Roman youth?
What are the end and scope of the English laws?
What do you understand by Civil Liberty?
Is Blackstone's definition of Civil Liberty applicable to a free state? (*note.*)
What reasons are there why even the humbler classes ought to acquire some knowledge of the laws?
What consideration should weigh with gentlemen of fortune in doing so?
With the nobility?
Why did Mutius Scævola reproach Sulpicius, and with what result?
Why should clergymen and medical gentlemen acquire some legal knowledge?
Why should practitioners in the spiritual and maritime courts in England, study our municipal law?
Where is English Law now taught?
What does Fortescue say to his Royal pupil concerning the study of the law?

CHAPTER III.—(Pages 15—23.)

LAW IN GENERAL, AND ITS DIFFERENT KINDS.

What is Law, in its strict and proper sense?
What do you mean by *obligation*, and *duty*?
Is the word *law* properly applicable to inanimate matter, or irrational creatures?
What is the most general division of laws?
What is the difference between the sanctions of Divine and Human Laws?
Who is the superior from whom, and the inferior to whom, Laws proceed?
What are the three principles to which Ulpian reduced the whole doctrine of law?
What does Savigny say concerning the maxim of Ulpian? (*note.*)
What is the foundation of Ethics?
What is the observation of Dr. Johnson, on the subject of the Revealed Law?
From what source is derived the authority of human laws?
Is it a moral duty to obey the law of the land?
What is the presumption in favour of it?
Is every one at liberty to disobey a law which he may deem opposed to the Divine Law?
What is the principle laid down in the text?
What relation does the Natural bear to the Revealed Law?
What is the view of Bishop Butler on this subject? (*note.*)
How does a human law operate in respect of acts intrinsically wrong, and acts in themselves indifferent?
How does the Law of Nations come into existence?
Is it of ancient, or modern origin?
In what respects are ancient and modern States distinguished from each other, with reference to their intercourse?

CHAPTER IV.—(Pages 24—33.)

MUNICIPAL LAW.

What is the definition of Municipal Law?
From what is it distinguished, by being called, a Rule?
Why a rule of civil conduct?

Why should it be prescribed ?
What have you to say on the subject of *ex post facto* laws ?
May ignorance of a law excuse a breach of it, after the law has been duly notified ?
By whom ought Law to be made ?
What is a State ?
What is the duty of the Supreme Power in a State ?
What are the four parts of a law ?
Does the first operate on actions intrinsically right and wrong ?
How do you distinguish between *malum prohibitum*, and *malum in se ?*
What do you mean by the sanction of a law ?
How did the Romans treat a law which had no sanction ?
What is the case of an English law which attaches no penalty to disobedience ?
What do moral writers mean by "duties of imperfect obligation ?"

CHAPTER V.—(Pages 34—41.)

DIFFERENT FORMS OF CIVIL GOVERNMENT.

What may be regarded as the foundation and cement of society ?
What do you understand by the expression, "the original contract of society ?"
How does the necessity of Government arise ?
What is the principle lying at the basis of all government, or political union ?
Is there any relation between equality and justice ?
What is signified by the expression, "*jura summi imperii ?*"
What were the three forms of government recognised by the ancients ?
Have the moderns discovered any other ?
How many forms of government exhaust the subject ?
Can you describe each ?
What objections are there to the democratical form of government ?
To the aristocratical ?
What is an oligarchy ?
What are the objections to the monarchical form of government ?
What did Cicero and Tacitus say concerning a combination of the three forms ?
What reason can you give for the ancients deeming a mixed government impossible ?
Was each of the three forms of government radically defective ?

In what respect?
How do you define a mixed government?
What is the theory of the balance of powers in a government?
Is it a tenable theory?
What is the grand solution of these difficulties, discovered in modern times?
What are its two essential conditions?
On what principle were made the alterations in the British Constitution in the year 1832?

CHAPTER VI.—(Pages 42—53.)

THE COMMON LAW OF ENGLAND.

Into what two kinds is the municipal law of England divided?
Did this exist in the Greek and Roman law?
What do you mean by the unwritten law?
What does Lord Bacon say about our laws?
What is the character of king Alfred's Doom-Book?
How many, and what, were the principal systems of law prevailing in England about the beginning of the 11th century?
What were *the laws of Edward the Confessor?*
What gave origin to the Common Law?
What do you understand by that term?
Into how many kinds is the Common Law divided?
Can you give any example of the first division?
How is the existence of these customs ascertained?
How are the judges regarded?
What are Records?
What regard is paid to Precedents?
Can they be altered, and by whom?
What are the Year-books?
Who reports the decisions of courts of justice?
Mention some of the leading authorities on the Common Law?
How may Sir Edward Coke be regarded?
What are particular customs?
What are the rules on which their validity depends?

CHAPTER VII.—(Pages 54—62.)

THE CIVIL AND CANON LAWS.

Explain the footing on which stand the civil and canon laws, in this country?

Give an outline of the character and progress of the civil law.

What have you to say concerning the institutions of Gaius, and the alleged discovery of the Pandects at Amalfi?

Are there any, and what reasons, why common lawyers should acquire a knowledge of the civil law?

Explain the introduction, progress, and present position of the canon law.

To whom lies an appeal from the Ecclesiastical and Maritime Courts, and what is proved by it?

CHAPTER VIII.—(Pages 63—66.)

THE WRITTEN LAW—STATUTES, AND THE CONSTRUCTION OF THEM.

What is the preliminary recital in every statute?

What is the distinction between public and private statutes?

What did the Romans call them?

What are Declaratory and Remedial statutes?

What is the golden rule for construing statutes?

State the other leading rules.

CHAPTER IX.—(Pages 67—69.)

EQUITY, AND ITS RELATIONS TO LAW.

Give Lord Redesdale's exposition of the relations between Law and Equity in this country.

What steps has the legislature lately taken, affecting them?

CHAPTER X.—(Pages 70—91.)

COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

What does England include, by the Common Law?
Explain the union between England and Wales,—how, when, and by whom effected?
When, and how, was effected the union with Scotland—and what are the leading articles of it?
What were the conflicting predictions concerning it, and which have been verified?
What is the position of Berwick-upon-Tweed?
When was the union with Ireland effected?
Was any, and what alteration, then made in the style of the royal dignity?
What are the leading articles of the Union?
Which was expressly declared an essential and fundamental part of the Union?
What has since happened with regard to the Union?
What laws prevail in the Isle of Man and the Channel Islands?
What principles regulate the relations between the mother-country and her Colonial possessions?
What jurisdiction exists, with reference to the high seas?
Where are offences on it tried?
What are the ecclesiastical divisions of the kingdom?
State the origin and progress of parishes and parish churches.
What has been recently done by the legislature to extend the influence and utility of the Church of England?
What is the civil division of England?
What are counties palatine, and what changes have been lately effected in them?
What are counties corporate?
Give an outline of the existing foreign possessions of the British Crown.

CHAPTER XI.—(Pages 92—97.)

ABSOLUTE RIGHTS OF INDIVIDUALS, GENERALLY.

What do you understand by *jura personarum*, and *jura rerum*?
What is meant by artificial persons?

What are absolute, and what relative duties?
How does municipal law deal with them?
Why ought the distinction between Law and Ethics to be strictly observed?
What do you understand by the "natural liberty of mankind?"
What is political or civil liberty?
What is the law of England and France with reference to slavery?
What has England done, during the last half century, towards abolishing slavery?

CHAPTER XII.—(Pages 98—113.)

ABSOLUTE RIGHTS OF THE INHABITANTS OF GREAT BRITAIN.

State the leading parliamentary assertions of our liberties when they were thought to be in danger.
What observation was made concerning them by Lord Chatham?
What are the primary rights of the people of England?
In what consists the right of personal security? Into what is it branched?
What alone can determine them?
What is civil death?
Of what consists personal liberty?
What is the language of Magna Charta?
What is the Habeas Corpus Act?
Under what circumstances may this act be suspended?
What is necessary to render imprisonment lawful?
How may a British subject be sent out of the kingdom against his will?
In what consists the right of property?
What does the great Charter enact respecting it?
What is the principle on which the legislature obliges a man to part with his private property to effect a public purpose?
Mention two modern cases in which the power has been carried very far.
What is necessary to the validity of a tax?
How are these three great rights protected by the law?
What are the five auxiliary rights of the subject for maintaining their liberties?
What other great rights of British subjects may be enumerated?
State the substance of Bishop Butler's account of civil liberty.

CHAPTER XIII.—(Pages 114—1[illegible].)

CONSTITUTION OF THE BRITISH PARLIAMENT.

Explain the most universal public relation by which men are connected together.

How and why is the supreme power divided in this kingdom?

How far back can the present constitution of parliament be traced?

How is parliament summoned together?

By whom, and why?

How often?

What practical necessity exists for the annual meeting of parliament?

Of what does Parliament consist?

Explain the nature of the Queen's position with reference to parliament.

What would be the evils resulting from blending the legislative and executive into one authority?

Explain the existing state of the constitution in this respect.

Who are the spiritual peers, and what are their relations to the temporal peers?

Explain the position of Scotch and Irish temporal peers?

Has the Queen an unlimited power of creating peers?

What passage in recent constitutional history has Lord Brougham placed on record?

Who are the commons?

With what object are they elected?

Must all the branches of the legislature concur to make a new law?

Was this always so?

CHAPTER XIV.—(Pages 125—131.)

POWER AND PRIVILEGES OF PARLIAMENT.

What did Lord Treasurer Burleigh and Sir Matthew Hale say concerning parliament?

What oaths must be taken before sitting in parliament?

Can Jews sit there?

From what maxim may be deduced the law and custom of parliament?

Give an account of a recent remarkable conflict between the House of Commons, and a Court of Law.
What are the existing privileges of the House of Lords and Commons?
What are proxies, and protests?

CHAPTER XV.—(Pages 132—143.)

HOUSE OF COMMONS AND ITS PROCEEDINGS.

What are the functions of the Houses of Lords and Commons, with reference to the raising of taxes?
Why is a qualification from property required in electors?
What are the three great requisites to be looked for in them, to secure the proper exercise of the franchise?
Give an outline of the great changes in the parliamentary franchise in the year 1832.
What is the new system of registration?
Who are excluded from sitting in the House of Commons?
What property qualification is requisite for sitting there?
What is the present mode of issuing writs, and taking polls?
How are electors guarded against the over-awing and undue influence of the Crown?
State the general nature of the Corrupt Practices and Prevention Act, 1854.
Who decides controverted elections?
May a man be elected without his knowledge or consent?
Can he resign at pleasure?

CHAPTER XVI.—(Pages 144—157).

ROUTINE OF BUSINESS IN PARLIAMENT.

Is there any, and what, difference between the office and appointment of the Speakers of the two houses?
What is the distinction between public and private bills, and how is either introduced?
Is there anything peculiar in the introduction of bills relating to trade and religion?
Repeat the enacting style of every act of parliament.

Explain the process of introducing, reading, committing, and passing bills in the lords and commons.

How is the royal assent given to a bill?

When does an act come into operation?

State the difference between an adjournment, and prorogation of parliament?

In how many ways may a dissolution of parliament be effected?

CHAPTER XVII.—(Pages 158—166).

DOCTRINE OF THE HEREDITARY RIGHT TO THE THRONE.

Where is vested the supreme executive power of these kingdoms, and with what object?

What is the fundamental maxim on which the right of succession to the throne depends?

What are the respective advantages or disadvantages of hereditary or elective monarchy?

What is the nature of lineal and collateral descent?

What difference is there between the inheritance of the crown, and private landed estates?

Can you give any historical examples of the difference?

What is meant by the half-blood, and representation?

Is the hereditary right to the throne indefeasible?

What significance is there in the words "the king's majesty, his heirs, *and successors?*"

Has a new limitation, by parliament, of the crown, any effect on its descendible quality?

State the four points of the doctrine of the hereditary right to the throne.

Has it, at all periods of our history, been the constitutional canon that "the king never dies?"

What is the proclamation of the king's peace?

CHAPTER XVIII.—(Pages 167—204.)

HISTORY OF THE SUCCESSION OF THE BRITISH MONARCHS.

In ancient times of English history, did an interval ever elapse between the death of one sovereign, and the recognition of his successor? Why?

Was the crown hereditary or elective among the Saxons?

State the nature of it.

How did contemporary chroniclers speak of a new sovereign's accession?

From what period did the custom become uniform, to date the accession from the demise of the predecessor?

Is the distinction in question of any importance chronologically? How?

What difference was there between the Anglo-Saxon, and the modern, "*king?*"

Is it correct to say, that the crown of England has *always* been absolutely hereditary?

What title had Egbert?

How did the crown descend during the reigns between Egbert and Edmund Ironsides?

How did Canute acquire a right to the throne?

In whose person was the ancient Saxon line restored, and when?

What right had Harold?

In whom was the real title at the time of the Norman invasion?

What right did William the Conqueror set up?

What was the nature of the Conquest?

What right had Stephen?

What right had Henry II.?

How did John obtain the throne?

Had Henry III. a good title? How?

What was the nature of the descent of the crown, during the interval between Henry III. and Richard II.?

When did the regnal year of Edward II. begin and end?

Is there good reason for believing that the death of Richard II. was caused by unfair means?

Where was the right to the throne, on the resignation of Richard II.?

How did Henry IV. come to the throne?

What important right did the parliament exercise in his reign?

When was first taken the distinction between a king *de jure*, and a king *de facto?* Why?

What reasons are there for holding the house of Lancaster to be lawful sovereigns of England?

How did Richard III. acquire the crown?

Is there sufficient ground for believing that Richard III. murdered his two nephews?

How did Henry VII. claim the throne?

Have you any explanation to give concerning the words "*exceptâ dignitate regali?*"

Has there been any recent discovery connected with them?

How did the parliament deal with the title set up by Henry VII.?

What put an end to the wars of the Two Roses?

How did Henry VIII. succeed?

What statute, passed in his reign, proves the four points of the doctrine of the succession? How?

Give an account of Henry VIII.'s alleged valid execution of a will disposing of the succession.

How did parliament deal with the right of Mary?

Are there any extant instruments dated in the reign of "Jane, Queen of England?"

How did parliament recognise the right to Elizabeth?

Did it pass any act solemnly affirming the right of parliament to direct the succession to the crown?

By what title did James I. ascend the throne?

Did his claim of divine right receive any sanction from the legislature?

Can you suggest any practical reason why he magnified the inherent rights of primogenitary succession, as indefeasible?

What did the judges who tried Charles I. tell him concerning his title?

What did the convention declare concerning the right of Charles II?

What practical remark may be made concerning the struggles between the crown and the parliament in the time of James I. and Charles I.?

What is the first instance of parliament exercising its right of altering the succession, after the accession of Charles II?

Give a history of the famous Exclusion Bill, and the doctrines involved in it.

What were the true principles on which the Revolution of 1688 proceeded?

Explain the sense in which the word "abdicated" was then used.

On what ground does Blackstone prefer to rest this great transaction?

Give the substance of the famous *Declaration* of the lords and commons, declaring William and Mary king and queen?

What did William say about being made regent?

What declaration did he make on receiving the crown from the speaker of the house of lords?

How did the convention settle the crown, and on what principle?

What was the nature of the title of William, Mary, and Anne?

Was any new disposition of the succession made in the reign of Queen Anne? Why did it become necessary?

State the substance of it.

What does Mr. Hume say on the subject of protestant succession?

In what, after these parliamentary interferences, may be said now to consist the constitutional nature of the right to the succession?

What has been objected to in the tone in which Blackstone speaks of the Revolution of 1688?

In what sense may that glorious event be spoken of as also "fortunate?"

In what respect may our constitutional monarchy be regarded as a compromise?

How is the Queen of England to be regarded, in respect of her person and office?

CHAPTER XIX.—(Pages 205—208.)

THE QUEEN AND THE PRINCE CONSORT.

How do you define a queen regnant?

Who was the first queen of England, and what was asserted by parliament on her accession?

What is the legal style, and when established, of the sovereign?

In what relation does the husband of a queen regnant stand to her?

What provision has parliament made for a regency?

Whom did it nominate, in the event of the necessity arising, and with what limitations and conditions?

CHAPTER XX.—(Pages 209—214.)

THE ROYAL FAMILY.

What prerogatives has a queen consort?

In what respects is she on the same footing as the queen regnant?

What privileges are enjoyed by a queen dowager?

Is she within the statute of treason? Why?

Can she marry a subject?

Does the case of Catherine, queen dowager of Henry V., really illustrate this fact, as supposed by Blackstone?

What titles are borne by an heir-apparent to the crown, when a male?

How does he acquire them?

Was Edward VI. ever created Prince of Wales by his father?

Were Mary and Elizabeth ever created Princesses of Wales?

What are the provisions of the Royal Marriage Act?

What was decided in the year 1844, in the Sussex peerage case?

CHAPTER XXI.—(Pages 215—221.)

THE QUEEN'S COUNCILS.

What is the first of the councils which the law has assigned the queen?

Does the expression, "high court of parliament," correctly designate parliament in its *legislative* capacity? Why?

How are the peers of the realm counsellors of the queen?

What are their rights and privileges ?
In what manner can the judges be said to constitute a 'council' of the queen ?
What is the principal council belonging to the queen ?
What is the privy council ?
Who are now eligible to sit in it ?
What is the duty, as defined by the oath, of a privy councillor ?
On what depends the dissolution of the privy council ?
Is there a privy council for Ireland ? And for Scotland ?
How are the functions of the privy council now exercised, when the queen is not present ?
What is a cabinet council ?
Have its members, as such, any legal responsibility ?
What is the judicial committee of the privy council ?
What two other committees of the privy council are there ?
How are designated the acts of the privy council, when the queen is present ?

CHAPTER XXII.—(Pages 222—224.)

SECRETARIES OF STATE.

What reason does Blackstone assign for passing over secretaries of state, without notice ?
Give the history of the appointment of these high officers.
What alteration was made in the year 1854 ?
What have you to say concerning their magisterial capacity ?
How many principal and under secretaries of state can now sit in the house of commons together ? [*Vide ante*, p. 708.]

CHAPTER XXIII.—(Pages 225—228.)

THE QUEEN'S DUTIES—THE CORONATION OATH.

What do you understand by the words, Protection, and Subjection ?
What does Bracton say concerning the duty of the king ?
What statute declares the laws of England to be the birthright of the people, and that all kings and rulers are to observe and govern according to them ?
What was meant by the words, "*the original contract*," which the Convention declared to have been broken by James II. ?
Give an account of the use of that expression.
In what are now couched the terms of that contract between sovereign and subject ?
State the substance of the oath.

CHAPTER XXIV.—(Pages 229—244.)

THE ROYAL PREROGATIVE.

What is a principal bulwark of civil liberty in this country?
What is meant by "*prerogative?*"
What do you understand by the attribute of *sovereignty?*
Is the person of the sovereign sacred, even though his measures may be tyrannical?
What redress exists for public or private injuries, inflicted by the crown?
How may the subject proceed for redress of a private injury?
In case of public oppression?
What responsibility is attached to the advisers of the crown?
Can the queen, or either house of parliament, be said to do any wrong?
What precedent do our annals afford us, in a case of extreme public wrong?
What is meant by the maxim, "The queen can do no wrong?"
Can the king or queen ever be, in judgment of law, a *minor?*
How is this illustrated by the appointment of a regent, and by whom is it made?
What is meant by the maxim, "The queen never dies?"
Why is the executive part of government vested in the queen, as a part of her royal prerogative?
In what respect is she the sole magistrate of the nation?
What capacity has the queen, with regard to foreign concerns?
What does she do, by virtue of this prerogative?
What check is there on the exercise of this prerogative?
In whom does the constitution place the sole power of making war and peace?
What special check is there on the exercise of this power?
Who grants safe conducts? What are they?
What is the difference between aliens, subjects of friendly or hostile states, with reference to entering this country?
What is the first prerogative of the queen, in domestic matters?
What relation does she bear to the two houses of parliament?
Who is the first in military command, within the kingdom?
Who is the fountain of justice, and general conservator of the peace?
What is meant by the fountain of justice?
In what relation does the queen stand to our courts of justice?
How is the independence of our judges secured?
What does Mr. Justice Story say concerning this provision of our laws?
Can the sovereign personally administer justice? Why?
Why are public prosecutions in the queen's name?

How does the separate existence of judicial power, contribute to procure public liberty?

What evils would follow from combining it with the legislative or executive powers?

In what sense is the sovereign, in the eye of the law, always present in the courts of justice?

Who alone can lawfully issue proclamations?

When are they binding?

Who is the fountain of all honour, office, and privilege, in this country?

Can a subject of the queen be allowed to enjoy foreign distinctions here, without the queen's permission? Why?

What is the queen's prerogative with reference to the money or coin of the realm?

Who is the head and supreme governor of the national church?

CHAPTER XXV.—(Pages 245—247.)

ROYAL REVENUE.

How are the hereditary revenues of the crown now dealt with?

Who commenced this practice?

Has the crown, or the public, gained by the change?

To what extent, between the years 1760—1830?

What arrangements were made on the accession of her majesty?

What is the net yearly revenue of the queen?

How is it arranged?

What was done by her majesty on the imposition of the income tax?

CHAPTER XXVI.—(Pages 248—259.)

SUBORDINATE CIVIL OFFICERS.

What is the derivation of the word *sheriff?*

What is he called in Latin? Why?

How was the sheriff formerly appointed, and how now, and why was the change effected?

What are his duties, as keeper of the queen's peace?

What is the *Posse Comitatûs?*

Can a sheriff try a criminal case? Why? Or, as such, be also a justice of the peace?
What are his ministerial duties? And as the queen's bailiff?
What is the *coroner?*
How chosen, and for how long?
What are his duties, and what the character and incidents of his court?
What is meant by a deodand? Is it now in existence?
Who is the chief of the *justices of the peace?*
Who is the sovereign conservator of the peace in these realms?
Was the election of conservators of the peace ever vested in the people?
How are they now appointed?
What is the distinction between stipendiary and other justices?
In how many ways is the office of a justice of the peace determinable?
How are justices protected, by recent legislative enactments, from being harassed by legal proceedings?
How is the peace of the kingdom now generally preserved, in towns?

CHAPTER XXVII.—(Pages 260—269.)

THE PEOPLE.

Who are natural-born subjects?
Explain the doctrine of allegiance.
What change in the oath of allegiance was made at the Revolution of 1688, and why?
What is its present form?
Has the queen a right to the allegiance of her subjects, without any oath?
What does Sir Edward Coke say on this subject?
What distinction exists between natural and local allegiance?
Can the former be severed, or annulled?
Give an instance.
Is a queen's subject exempt from his allegiance, by going to a foreign country?
Is any allegiance due from an alien?
What is the correlative right of allegiance?
In what way only can a natural-born subject forfeit his rights?
What relaxations of the law have lately been made in favour of aliens?
What was *jus postliminii*, and how applicable to our doctrine of allegiance?
Is the child of an alien born in England, an alien or natural-born subject?
How may naturalisation be now effected?
Who is a denizen?

What did Lord Bacon say concerning naturalisation of strangers?
What is the population of the United Kingdom, according to the census of 1851?

CHAPTER XXVIII.—(Pages 270—275.)

THE UNITED CHURCH OF ENGLAND AND IRELAND.

What is provided by the fifth article of the Union between Great Britain and Ireland, with regard to the Churches of England and Ireland?
What is the statute law fixing the relations between the Crown and the Church?
How does the 55th Canon describe the sovereign?
What is signified by "the head, in earth, of the Church of England?"
What is the doctrine of Saint Augustine?
What is said by Hooker?
What are the two statutes binding together the Church and the State?
What is Convocation? and what is said concerning the revival of it in the present times?
In what right does the Crown nominate to bishoprics and other preferments?
Who is the *dernier ressort* in all ecclesiastical cases?
How is such jurisdiction now exercised?

CHAPTER XXIX.—(Pages 273—278.)

UNION BETWEEN CHURCH AND STATE.

What is meant by a religious establishment?
What are the leading arguments for, and against it?
What does Bishop Warburton lay down, as a great preliminary and fundamental article of the alliance between Church and State?
What does Edmund Burke say concerning the Church and State?
What is the duty of members of the Church of England?

CHAPTER XXX.—(Pages 279—282.)

THE CHURCH OF SCOTLAND.

What is provided by the Articles of Union between England and Scotland, concerning the Church of Scotland?

What is the nature of that Church?
Who introduced that form of ecclesiastical government into Scotland?
What is the meaning of "Presbyterian?"
What is believed on this subject by the Presbyterians?
How do they distinguish between Presbyterianism and Prelacy?
Do the laity form part of the judicatures of the Scottish Church?
What are the lay members called?
How many ecclesiastical judicatures are there in the Church of Scotland? Name, and describe them.
What is the standard of the doctrines of the Church of Scotland?
What is the oath prescribed by the Act of Union, to be taken by every sovereign, on accession, concerning the Church of Scotland?

CHAPTER XXXI.—(Pages 282—289.)

DISSENTERS; ROMAN CATHOLICS; JEWS.

What does Blackstone say concerning the treatment, by our ancestors, of Nonconformists?
What are they now called?
How many different sects of dissenters are there now in England and Wales?
What modern enactments provide for the free and undisturbed exercise of all religious rites by dissenters?
What is the nature of the Declaration, to be taken by a dissenter, before admission to office, instead of taking the sacrament as formerly required?
How are the marriages of dissenters solemnised?
What other provisions have been lately made in favour of dissenters?
What did Locke say concerning toleration of the Roman Catholic Church?
In what year was passed the important Act for the relief of Roman Catholics?
From what offices are they still excluded?
What is the general nature of the oath substituted, in the case of Roman Catholics, for those of allegiance, supremacy, and abjuration?
Can a person in holy orders, in the Roman Catholic Church, sit in the house of commons?
Give some account of other restrictions still imposed on Roman Catholics.
Are Jews admissible to all municipal offices?
What is the Declaration which they are required first to make and subscribe?
What prevents Jews from sitting in parliament?

CHAPTER XXXII.—(Pages 290—305.)

THE CLERGY.

What is the general nature of the immunities or privileges enjoyed by the clergy, and with what object?
Are they restrained from trading, and with what exceptions?
How are archbishops and bishops constituted?
By what means were elections to the episcopal chair, taken from the people, and with what object vested in the emperors and sovereigns of Europe?
What was confirmation? Investiture?
By whom was the laity gradually excluded from the election, by the pope?
What steps were taken by the pope to render the clergy independent of civil authority?
What was the difference of investiture *per sceptrum*, and *per annulum et baculum*?
What was the origin of the *congé d'eslire*?
What was the nature of it?
How is it now performed?
What recent case, of great interest, illustrates this subject?
How many archbishops and bishops are there?
What are the duties of an archbishop?
What are the powers and authorities of a bishop?
How may archbishoprics and bishoprics become void?
What are a dean and chapter?
How is a dean now appointed?
How do deaneries and prebends become void?
What are the functions of an archdeacon?
Of a rural dean?
Who is a parson, and why is he so called?
What is meant by the "appropriation" of ecclesiastical dues?
Give the history of it.
From what two roots have sprung *lay* appropriations?
Who is a vicar, and why is he so called?
How did a vicar become perpetual?
With what is he endowed?
What is the difference between great and small tithes?
What great change in the tithe system was made in the year 1836?
What is necessary to constitute a parson, or vicar?
What do "holy orders" include?

What is requisite to being ordained deacon?
On what grounds may a bishop refuse to institute a clerk presented to a parsonage, or vicarage?
What is a collation to a benefice?
What is induction?
Has the legislature lately interfered to remedy the evils of non-residence?
How may a parson or vicar cease to be such?
What is meant by a *commendam?*
Is there any such now?
What is a curate? A perpetual curate?
What is a churchwarden, and how appointed?
What is his duty?
In what light are parish clerks and sextons regarded by the common law?

CHAPTER XXXIII.—(Pages 306—318.)

NOBILITY, RANK, AND PRECEDENCE.

Whence are derived all degrees of nobility and honour in this kingdom?
What are the degrees of nobility here?
What is the first title of dignity after the royal family?
In what state was this order of dignity in the reigns of Elizabeth and Charles II.?
What is the origin of the second degree of nobility?
Which is the most ancient title of nobility?
Whom does the queen, in formal instruments, address as "trusty and well-beloved *cousin?*"
Who first used the expression, and why?
When was the degree of a viscount created?
What is the most universal title of nobility?
Give its history; mention the sovereign who first made it a mere title of honour, conferred by letters patent.
What was originally the nature of the right of peerage?
Give an explanation of the present mode of creating peers.
What is the distinction between creation by writ, and by patent?
Mention some of the leading incidents of nobility.
What unjust privilege of peerage was abolished in the year 1841?
How can a peer lose his nobility?
Is there any instance of degradation from it, by act of parliament?
How does the law regard the commonalty?
Give explanations of the various orders of knighthood in this country.

What is the origin of baronets?
Explain the terms *Equites Aurati*, and *Milites*.
Are esquires, and gentlemen, names of dignity?
Who are, in law, esquires?
What does Lyttleton say concerning the sons of gentlemen?
What is the rank of women, married, unmarried, and widows?
Does office confer rank on the wife or children of him who holds it? (P. 317, n. .)

CHAPTER XXXIV.—(Pages 319—327.)

MILITARY AND NAVAL ESTATES.

Explain the distinction between the *military* force and the *militia*, and state who first established the latter.
What occasioned the fatal rupture between Charles I. and his parliament?
What is the leading feature of the militia?
What does the petition of right enact, concerning the soldiery?
Who first established a standing army?
Mention an observation of Mr. Macaulay with reference to this subject.
What does the bill of rights enact concerning a *standing army*?
On what footing are standing armies now in England?
What is the nature of the authority which her majesty exercises over the army?
What are the rights of officers, as to entering or leaving the army?
How is enlistment effected in this country?
Can a British subject enlist in a foreign service?
What is the Mutiny Act, and how often enacted, and why?
Is there any distinction between military and martial law?
What is the observation of Sir Matthew Hale concerning the latter?
Who are the Marines, and to what law are they subject?
On what footing is our Indian army?
How is the subordination of the military to the civil power preserved?
Can soldiers be employed to preserve the peace?
Mention the *dictum* of Lord Chancellor Hardwicke.
Is the "impressing" of seamen into the royal navy lawful?
What provisions has the legislature recently made, with a view to induce voluntary service in the navy?
By what laws is the naval service regulated?
What great national policy has been lately, and boldly, reversed by the legislature?
By what is the Mercantile Marine now regulated?

CHAPTER XXXV.—(Pages 328—329.)

THE THREE GREAT RELATIONS IN PRIVATE LIFE.

What is the most universal public relation, by which men are connected together?
What are the three great private relations?
What reflection may be suggested by considering the relation of master and servant, as involving that of principal and agent?

CHAPTER XXXVI.—(Pages 330—339.)

HUSBAND AND WIFE.

In what light does our law regard marriage?
Is a contract of marriage legally enforceable?
What is necessary to constitute a valid one?
What is the maxim adopted by the common law, from the civil law?
What are the disabilities and incapacities for entering into this contract?
At what age may parties contract for marriage?
What are the prohibited degrees of consanguinity and affinity? And what the consequence of violating them?
Can a man marry his wife's sister, or sister's daughter, or his first cousin?
Can two brothers marry two sisters? Or father and son a mother and daughter?
State the grounds for the distinction.
How many modes are there of solemnising matrimony?
What is the difference between marriages of dissenters, and members of the Church of England?
How may a marriage be dissolved?
On what great legal principle depend the rights, duties, and disabilities of husband and wife?
State some of them.
Can they give evidence for and against each other?
State any recent alteration of the law on this subject.
How does the civil law regard husband and wife?
Is this rule recognised to any extent in England?

What rights has a married woman in respect of her real property?
When will the law mercifully presume the husband's coercion, and protect her from the consequences of crime?
Has the husband a right to his wife's person and society?
May he retake her, or retain her, by stratagem?
What did Lord Stowell say on the subject of incompatibility of temper in husband and wife, and the *necessity* of living together?

CHAPTER XXXVII.—(Pages 340—346.)

PARENT AND CHILD.

What is the difference between the English and the civil law, in defining a *legitimate* child?
Which is founded on the better reason?
What are the leading duties of parents to their children?
Under what limitation is placed the duty of a parent to maintain his children?
Is there any, and what difference, between the English and the civil law, as to a parent's disinheriting a child?
Does the English law compel a parent to educate his child? Or do anything to encourage the education of children of the humbler classes?
What difference is there between the English and the civil law as to a parent's *power* over his child?
When does a father's power over his child cease?
What power has a mother over her child?
What is the duty of a child to its parent?
Does it cease toward a bad parent?
What was the occasion of the famous declaration of the peers, at the parliament of Merton, *nolumus leges Angliæ mutare?*
What are the rights of an illegitimate child?
Who is entitled to the custody of it, the mother, or putative father?

CHAPTER XXXVIII.—(Pages 347—352.)

GUARDIAN AND WARD.

In what light is a guardian to be viewed?
What is the difference between a guardian by nature, and a guardian for nurture?

Is guardianship in socage now in existence?
Can a father dispose, by deed or will, of the custody of his child?
What is a guardian, so constituted, called?
Can there be a guardian to an illegitimate child?
How may a guardian be protected while acting in his trust *bonâ fide*?
How may he be called to account for abuse of his trust?
When does a male or female infant attain majority?
When does a person, born on the first day of January, become of full age?
On what principle is this?
What is a *prochein amy*?
How do you understand the rule of *doli capax*, and the maxim, *malitia supplet ætatem*?
What is necessary to admit the testimony of an infant of very tender age?
What general rule may be laid down, as to an infant's rights and liabilities, in respect of contracts entered into by him?
Is he liable for a tort or a crime?
What is meant by a *tort*?

CHAPTER XXXIX.—(Pages 353-366.)

MASTER AND SERVANT.—PRINCIPAL AND AGENT.

What is the foundation of the law relating to principal and agent?
Is it a universal relation, and of great importance to be understood?
How do you define the maxim *qui facit per alium, facit per se*?
What considerations should be attended to, in appointing an agent?
How is the existence of the relationship to be ascertained?
How the extent and duration of an agent's authority?
How does partnership illustrate the doctrines of agency?
What is the effect of touching English soil, on a slave?
What is declared by a celebrated edict under Louis XVI. concerning the rights of labour?
What are the exceptions to the rule in this country, that a man has a property in his own labour?
To what extent is it lawful for masters and men respectively to combine, for regulating the rate of wages, and labour?
What is the *primâ facie* presumption where one man does work for another?
What is a menial servant?
How is such an one hired?
For what cause may he be dismissed without wages?
Is a master bound to give a character to a servant who has left?

If he do, how far is he under the protection of the rule as to *privileged communication*?
How are labourers hired?
What is an apprentice?
Was the system known among the Greeks and Romans?
Is it necessary now to serve an apprenticeship, in order to set up a trade?
What recent legislative provisions have been made, to protect apprentices and servants from neglect and ill-treatment?
What is the principle regulating the engagement of the superior class of 'servants,' as clerks, agents, tutors, governesses, &c.?
Mention some of the leading rights and liabilities of masters and servants, as between themselves and third parties.
On what general principles do they depend?
What is the meaning of *respondeat superior*?
Is any other connected with, or referable to it?
Is a master liable for a *wilful* injury done by his servant?
What is the general rule as to liability for torts?

CHAPTER XL.—(Pages 367—381.)

THE POOR.

What was the Divine command to the Jewish nation, concerning the poor?
What is the great governing principle of the English poor-law?
What is the practical difficulty in administering relief to the poor?
What are the four words indicating it?
What effect had Christianity, in causing humane poor-laws to be enacted?
Was the state, or the church, first concerned in providing relief for the poor?
How is the care of the Anglo-Saxon church for the poor evidenced?
What is the character of the legislature against the poor, in the reign of Henry VIII.?
What was the source of that inundation of mendicancy then over-spreading the country?
What did Queen Elizabeth exclaim, on witnessing the great number of destitute poor?
State the substance of the celebrated statute passed in her reign, regulating ever since, the administration of relief to the poor.
What great omission in it was pointed out by Sir Matthew Hale?
What act relating to the poor was passed in the reign of Charles II.?
What is the meaning of settlement, and removal?

What were the effects of that law?
What led to the remodelling of the Poor-Laws in 1834?
What are the leading features of the new system?
What has been done in reference to the law of settlement?
What is proposed, and what has been recently attempted, by the legislature?
What beneficial provisions has the law made in respect of pauper suits?

CHAPTER XLI.—(Pages 382—405.)

CORPORATIONS.

What do you understand by the expression, in English law, "artificial persons?"
What are the different kinds of corporations?
State the objects and advantages of the institution.
With whom did they originate?
Explain the expression *tres faciunt collegium.*
Had the Romans the institution of a corporation sole?
Define a corporation aggregate, and sole.
Distinguish between lay and ecclesiastical, civil and eleemosynary corporations.
How are corporations created, in England?
Is any, and what, importance attached to the name of a corporation?
State the leading powers, rights, capacities, and incapacities of corporations.
What is meant by the head of a corporation?
Explain the maxim *ubi major pars, ibi totum.*
How are corporations, lay and ecclesiastical, visited?
How may corporations be dissolved, at common law?
What is a *Quo Warranto,* as applicable to corporations?
Explain the recent acts of the legislature, in creating *Quasi* corporations for trading purposes; to what they were owing, and what were the objects of such legislation.
What led to the remodelling of municipal corporations in the year 1835?
What affords a key to the legislature of that year?
Who are the constituents of a municipal corporation?
Who is entitled now to be a burgess, or citizen?
What constitutes the municipal franchise?
What is a councillor?
An alderman?
A mayor?
How is the Council constituted?

How is the municipal franchise annually revised?
State the general method of conducting business in the Council, and the provisions made for securing responsibility, and publicity.
With what reflection does this chapter conclude?

CHAPTER XLII.—(Pages 406—421.)

PROPERTY, ITS ORIGIN AND GROWTH.

Why is the right of property calculated to strike the imagination, and engage the affections, of mankind?
What is the only true and solid foundation of man's dominion over external things?
Can you sketch the growth of exclusive rights,—derived from the act of possession, and with reference to the substance, and products of the earth?
What was the subject of contention between Lot and Abraham?
What led to migration, and colonising?
What influence had the art of agriculture in establishing permanent property?
What followed from its being found that the manual labour of a part of mankind could provide for the subsistence of all?
What right was conferred originally by occupancy?
What was the result of abandoning property?
State the duty and liabilities of a finder of lost goods, and on what principles it depends.
How did property begin to be transferred from hand to hand?
How grew up the right of disposing of property, by the dying possessor?
Which was earlier, the right of inheritance, or of devising by will?
Describe the growth of the latter, especially in England.
Are there any and what things, which still, from the necessity of the case, remain in common?
What are they?
What has the legislature lately done with regard to commons, and waste lands?

CHAPTER XLIII.—(Pages 422—429.)

THE FEUDAL SYSTEM.

Is a knowledge of the feudal system, of importance to a student of the laws of this country?
Is it agreed whether feudal tenures were in use among the Anglo-Saxons?

Whence had they their origin?
Explain the growth of the system.
What is meant by *feoda*? *Allodium*?
What fundamental maxim became established in this country, on the introduction of the feudal system at the Norman Conquest?
Explain the operation of this measure, and of the word *tenant*, and *homagium*.
Give an account of the transition of feuds from a military, to a civil establishment.

CHAPTER XLIV.—(Pages 430—434.)

THE ANCIENT ENGLISH TENURES.

Explain the terms *tenement*, *tenant*, *tenure*, lord *paramount*, *mesne* lord, lord *paravail*.
How many principal species of lay tenures were there?
State and explain each.
Give Bracton's abstract of the ancient tenures.
What was knight-service, and what its seven fruits, or incidents?
What was *scutagium*, or *escuage*, and what did it indicate in the progress, or decline of feuds?
What was the grievous complaint of Sir Thomas Smith, the secretary of Edward II.?
When and why were the military tenures abolished?
In what respect may the statute abolishing them, be spoken of in comparison with Magna Charta?

CHAPTER XLV.—(Pages 435—440.)

THE MODERN ENGLISH TENURES.

Was the feudal system entirely abrogated, on the abolition of the military portion of it?
To what general species of subsisting tenure, were all other tenures reduced, at the restoration, in 1660?
What is free socage? and its origin?
From what source have sprung our copyhold tenures?
Explain manors, demesne lands, *folk*-land, *book*-land.
What was the court baron? Is it now in use?

Is there any recent enactment concerning the surrender by lords of manors, of manor courts ?

How did copyhold tenants acquire fixed rights against their lords ?

What is Sir Edward Coke's remark concerning copyhold tenures ?

What is a quit-rent ?

What has modern legislation done, in respect of commutation of copyhold rights, and enfranchisement of copyhold lands ?

CHAPTER XLVI.—(Pages 440—449.)

NATURE OF REAL AND PERSONAL PROPERTY.

What was the general nature of property, in the early ages of Europe ?

Explain the significance of the terms *Moveable* and *Immoveable* Property.

Could the former be the subject of feudal liabilities ? Why ?

How do you account for so little notice having been taken of it ?

Explain "lands, tenements, and hereditaments," and "goods and chattels."

How did the abolition of the feudal system lead gradually to a new designation of the property in lands and goods ?

What was that new designation ?

Do the terms "Real and Personal Property" now include kinds unknown to our ancestors ?

Give some instances.

Does a lease, for years, of lands or houses, form an exception to the original rule ?

Explain this.

What is the most conspicuous incident of real property still retained ?

What is the nature of the distinction between the terms *Corporeal* and *Incorporeal* property ?

Can you illustrate the distinction, and point out a very recent legislative interference with it ?

What is meant by things lying in *grant* and lying in *livery*, and does the distinction still exist ?

Explain the two kinds of incorporeal property.

Is there any, and what, difference between the modes of transferring real and personal property ?

How has arisen the jurisdiction of the Court of Equity ?

Will the law permit property to be made *inalienable* ? Why ?

Is any restriction imposed on the accumulation of the income of property for a future owner ?

State the eight canons of the existing law of descent : and their most signal variations from the former ones.

CHAPTER XLVII.—(Pages 450—460.)

WILLS; TESTATORS; INTESTATES.

Why is the [illegible] of wills of such universal importance?
What is the first will on record?
In what year was the law of wills placed on its present footing?
Who may now make a will?
What may be so disposed of?
Must a will be in writing?
How must it be signed?
Can another sign for the testator, and how?
Where must the signature *not* be?
Can you state any of the cases which by a very recent statute are declared not to affect the validity of a signature?
How must a signature be attested, and by how many witnesses?
Is there any difference in this respect between wills of real and personal property?
What is the law now, relative to revoking, reviving, or cancelling a will, and adding a codicil?
What is the effect of a gift, by the will, to an attesting witness?
Is there such a thing now as a nuncupative will? What is one?
When did the new Wills' Act come into operation?
What is a leading rule for construing a will, as contradistinguished to a deed?
Is an executor obliged to accept the office?
What is a probate?
Is there any, and what, difference between the operation of a will of real, and of personal property?
What is a *donatio mortis causâ*?
Is it revokable, or subject to debts, or legacy duty?
What is meant by dying intestate, or *quasi*-intestate?
What is administration *de bonis non*?
Who may be appointed administrator?
What security is given for faithfully executing the trust?
What is the duty of an executor or administrator?
What is the difference between a specific and general legacy?
What length of time has an executor for paying a legacy?
What is to be done with the residue?
What is the statute of distributions?

CHAPTER XLVIII.—(Pages 461—466.)

FRAUD.

What is meant by the maxim "Fraud vitiates everything?"
What presumption must be rebutted in the case of imputed fraud?
What did the Romans distinguish by the words *Dolus Malus*, and *Dolus Bonus*?
What practical deduction may be drawn from this distinction?
What two other maxims embody that deduction?
What false statement amounts to a fraud *in law*?
In what does actual fraud consist?
When must moral fraud be proved to invalidate a transaction, or furnish a cause of action?
What is constructive fraud?
Has the defrauded party to a contract the power of holding, if he choose, the other to his bargain?
What is the consequence of delay, in signifying his election to avoid the contract on the ground of fraud?
How does equity deal with contracts or instruments tainted by fraud?
What provision has the legislature lately made to meet the case of concealed fraud?
Is time a bar in such cases?
What frauds are cognisable, criminally, at common law?
How are such now punishable?
What is the ordinary instance of fraud criminally cognisable, by statute law?
Is the mere attempt to commit such fraud, punishable?

CHAPTER XLIX.—(Pages 467—479.)

SLANDER AND LIBEL.

What is slander, and what libel?
What are the two classes of slanderous words?
State the principles in which the law affords redress in each case.
Why is written, of a graver character than spoken, slander?
When is an intention to injure presumed?

Is there any and what difference between saying that a man is a swindler, and writing it?
What difference is there as to libel, between public and private persons?
In what sense are defamatory words to be understood?
What is the test?
Whose province is it to determine the question of libel, or no libel?
What is the proper mode of leaving the question to a jury?
What was the effect of Mr. Fox's libel act?
What is slander of title?
What is necessary to render it actionable?
What constitutes a publication of a libel?
Is it such, to send a letter to a man's wife, libelling him?
When will the utterance of disparaging matter be privileged?
What constitutes a privileged communication?
When and how must express malice in fact be proved?
Is the truth of the slanderous or libellous matter, a defence to an action for it?
Can you state the general scope of a recent admirable alteration of the law relating to libels in newspapers and periodicals?
How far is the truth available as a defence?
Has the making, or offering to make, an apology, any effect?
What is the punishment for threatening to publish a libel with intent to extort money or other advantage?
What was the principle involved in the memorable case of *Stockdale* v. *Hansard*?
What act of parliament was passed in consequence of it?
How did Mr. Justice Patteson, in that case, distinguish between *privilege* and *power*?
Under what circumstances will the court of Queen's Bench grant a criminal information for libel or even slanderous spoken words?
Can an action for slander or libel be brought in the county courts?
How are frivolous actions of libel and slander restrained?
What are the legal consequences of repeating defamatory matter, uttered by another, of a third party?
What is the object of the law, in dealing with slander and libel?

CHAPTER L.—(Pages 480—484.)

MALICIOUS ARREST; MALICIOUS PROSECUTION; FALSE IMPRISONMENT.

Why are actions for malicious arrest now less frequent than formerly?
Will an action lie for merely bringing an action against another improperly? Why?

When may an action to recover damages be brought for a malicious prosecution on a criminal charge?
What is the plaintiff in such an action bound to prove?
What is the legal definition of *malice*?
Explain the law relating to reasonable and probable cause for a prosecution, and by whom the question is to be determined.
What constitutes a false imprisonment?
What is, in the eye of the law, an imprisonment?
An assault? A battery?

CHAPTER LI.—(Pages 485—493.)

THE WRIT OF HABEAS CORPUS.

Explain the nature of a writ of Habeas Corpus, its object, and the manner in which it is to be obtained?
Why must every commitment to prison express the cause of it?
What case of oppression gave rise to the famous existing Habeas Corpus Act?
What are its leading enactments?
In what year was it passed?
How was it extended in the year 1816?

CHAPTER LII.—(Pages 494—500.)

MERCANTILE LAW.

Mention a prominent characteristic of the Mercantile Law of England.
How have the legislature and the courts dealt with it?
Give a sketch of its rise into a system.
Has the legislature latterly interfered more than heretofore with mercantile law? Why?
From what is the mercantile law mainly deducible?
What great distinction exists between the reasons on which are founded the law of real property, and mercantile law?
Give an illustration.
To which of three English judges is our mercantile law most indebted?
Under what fourfold division may the *Lex Mercatoria* be considered?

What is the nature of the test to which the rules of mercantile law are constantly exposed?

Mention two recent cases of such rules long acquiesced in, being suddenly challenged in a court of law, and overturned.

CHAPTER LIII.—(Pages 501—513.)

CONTRACTS.

Does the etymology of the word, throw any light on the meaning of a contract?

How does our law define it?

How that of France?

What practical questions of extensive importance arise at first sight out of this definition?

What kind of accord or assent is essential to constitute a contract?

What is duress, and its effect?

Is any particular form of a contract necessary?

How must the parties express themselves?

What bearing has the Statute of Frauds on contracts?

What did Lord Nottingham say of it?

What is its object?

What great distinction is there between the two sections relating to contracts?

What are the five classes of cases required by the fourth section to be in writing?

What does the seventeenth section enact?

In what other three cases are promises required to be in writing, by Statute 9 Geo. IV. c. 14, called Lord Tentenden's Act?

When must an agent, to enter into a contract on behalf of a principal, have a written appointment?

May a contract be collected from a series of letters?

Is the construction of it for the judge, or the jury?

What are the governing rules of construction?

Is oral evidence admissible to contradict, alter, or explain a written contract?

What are latent and patent ambiguities, and in which of them may oral evidence be called in to aid?

When is *usage* admissible?

What is the consideration of a contract?

Why does our law insist on this with such strictness?

State the law respecting *moral obligation*, as a consideration for a contract.

Define a consideration; and state when the gross *inadequacy* of it may be regarded, and for what purpose.

What does our law presume, as to capacity to contract?

Explain the principles on which the court deals with contracts entered into with drunkards, and insane persons.

What is a lawful object, or purpose, of a contract?

When is a contract illegal at common law?

What does a penalty imply?

What is the difference between an express and an implied contract?

What is a simple contract? What a specialty contract?

State certain peculiar characteristics of the latter, and the reason of them.

What is a recognisance?

What is the general rule as to performing a contract?

What are the respective duties of debtor and creditor?

Explain the maxims *Actus Dei nemini facit injuriam*, and *Lex non cogit ad impossibilia.*

If a person contract unreservedly and absolutely to do a particular act, what will be the effect of inevitable accident, or unforeseen contingency?

What legal and moral duty is incumbent on all parties to a contract?

CHAPTER LIV.—(Pages 514—530.)

THE SUPERIOR AND INFERIOR COURTS OF COMMON LAW.

What are signified by "The Superior Courts," and what are their relation to each other?

How did two of these acquire their jurisdiction over actions?

Can they properly overrule each other's decisions?

In what actions have they exclusive jurisdiction?

In what actions have they exclusive jurisdiction, subject to the right of the parties to prefer the decision of the County Courts?

Is there within these cases, a right of appeal, which the parties may dispense at their pleasure?

In what cases have the Superior Courts concurrent jurisdiction with the County Courts?

In what cases may a plaintiff sue in the Superior Courts, below the limited amounts, and subject to what liability?

Are there other Civil Courts of Record, with jurisdiction unlimited except by locality, and subject to removal into the Superior Courts?

What reason is assigned for thus specifying the restricted jurisdiction over actions at present enjoyed by the Superior Courts?

How may be illustrated the vast improvements lately effected in the administration of justice, by the Superior Courts?
State some of the leading features of such improvements, with a view to speedily, economically, and effectually disposing of cases on their real merits.
What new powers have been conferred on the Superior Courts of Law, for the purpose of enabling them to take cognisance of equitable merits?
What are the two statutes effecting the greatest and most recent of these improvements?
What is the exclusive jurisdiction of the Court of Queen's Bench?
Of the Court of Common Pleas?
Of the Court of Exchequer?
Give an account of the administration of justice by the judges on the circuits.
On what grounds do Blackstone and Hallam eulogise this system of administering justice?
What is the cardinal maxim concerning law and fact, to which is to be attributed the distinctive character of English jurisprudence?
Give an outline of the constitution of the New Local Courts.
What provision is made for continuing and improving the jurisdiction of other inferior courts of civil jurisdiction?
What does Lord Coke say concerning courts of inferior jurisdiction?
Give an account of the leading advantages and disadvantages of administering justice in the superior and inferior courts.

CHAPTER LV.—(Pages 531—537.)

COURTS OF EQUITY, ADMIRALTY, AND OTHERS.

What opinions were expressed by Lord Eldon, and Lord St. Leonards, on the subject of our Equity Jurisprudence?
Describe the manner in which the legislature has lately interfered with the distinctions between courts of law and equity.
What equitable powers are now conferred on courts of law?
Have great improvements lately been effected in the practice of the courts of equity?
How many courts of equity are there?
Describe the new court of appeal in equity.
Mention some of the chief improvements in courts of equity.
What is the nature of the present administration of justice in the courts of admiralty, bankruptcy, and insolvency?

CHAPTER LVI.—(Pages 538—548.)

COURTS OF RECORD; CONTEMPTS; EXCESS OF JURISDICTION; APPEALS.

What constitutes a court of record, and what important distinction exists between such, and those not of record?

What constitutes a contempt of court, and on what principles is it summarily punishable?

How are contempts of court punishable by the law of France?

State the principles on which the law acts, in restraining courts within the bounds of their proper jurisdiction.

What is the consequence of exceeding jurisdiction, as regards the act done, and the personal liability of the judge?

How far is an agreement valid to refer a prospective matter of difference to the decision of an arbitrator, instead of the superior courts?

[*Vide Corrigenda, post.*]

On what principles does English law act in affording and regulating facilities for appeal?

How may the verdict of a jury, the decision of a judge at chambers, of an arbitrator, a revising barrister, of an inferior court of record, of the court of bankruptcy, a court of equity, the court of admiralty, ecclesiastical and foreign British courts, be reviewed, reversed, or confirmed?

How may the exercise of summary jurisdiction by justices be reviewed?

How may the sentence of a court-martial be reversed?

What is the supreme ultimate court of appeal for the whole kingdom?

In what respects is Blackstone's account of it practically qualified by modern usage?

On what grounds can be vindicated the reposing of this great trust in that tribunal?

How far does the house of lords defer to the opinions which it receives from the judges?

What did the great Lord Nottingham say concerning the judgments which ought to be pronounced by the house of lords?

CHAPTER LVII.—(Pages 549—554.)

SUPPOSED UNCERTAINTY OF THE LAW.

On what fallacious grounds is uncertainty commonly attributed to the law?

What occasions the multiplicity of English laws?

How does the legislature interfere, when necessary to do so?
Is the English law less embarrassed with doubt and inconsistency than the civil and canon laws?
Is law or fact the greater source of difficulty in pronouncing a decision?
Give some illustrations of this, especially as dependent on the maxim, *Ex facto oritur jus.*
What is Dr. Paley's opinion on this subject?

CHAPTER LVIII.—(Pages 555—565.)

EVIDENCE AND WITNESSES.

What may be regarded as the leading characteristic of the recent changes effected in the law of evidence?
What change let in a sudden flood of light in the investigation of truth, by courts of justice?
How was this effected?
What is now the grand rule of law as to the admissibility of witnesses to give testimony in courts of justice?
Enumerate the few exceptions, and refer them to principle.
Is a person convicted of perjury now admissible as a witness?
What does the law presume as to the competency of a witness?
What is the cardinal distinction as to witnesses, and their testimony?
How does this affect the duties of the judge and the jury?
What are the advantages of open *vivâ voce* examination of witnesses?
Give an outline of the great improvements lately effected with reference to the examination of witnesses.
Do the same with reference to documentary evidence.
What general principles regulate the administration of this great branch of law?
Are they the same in Civil and Criminal courts, and in those of Law and Equity?

CHAPTER LIX.—(Pages 566—572.)

TRIAL BY JURY.

What does Blackstone regard as the glory of the English law?
What correction is offered to the *dictum* of Montesquieu, as adopted by Blackstone, concerning the reason why Rome, Sparta, and Carthage, lost their liberties?

On what grounds is vindicated the special excellence of trial by jury?

Illustrate by a syllogism the distinction between law and fact, and the provinces of judge and jury.

Which of our institutions chiefly preserves in the hands of the people, their due share in the administration of justice?

What does Blackstone regard as steps towards infringing trial by jury, and establishing the most oppressive of absolute governments?

Does the tendency of modern legislature abate or increase the force of his opinions?

What does he pronounce to be the duty of every man to his country, with reference to trial by jury?

What are the inroads made, in the present day, on this great institution?

Why is the power of deciding matters of fact, more liable to abuse than in respect of questions of law?

How does Lord Brougham explain the special fitness of a jury to aid the court in administering justice?

Is the law of England and of Scotland the same, as to trial by jury?

What recent alterations have been introduced into either, as to unanimity?

When was the jury law of England consolidated?

What course is adopted when a foreigner is put upon his trial for a crime?

What question was determined in the course of the year 1849, in the case of the murderess Maria Manning?

CHAPTER LX.—(Pages 573—579.)

CRIMES.

Mention the leading features of recent change in the administration of our criminal law.

Has the severity of the criminal code been increased, or diminished?

What are the reflections of Blackstone on sanguinary severity of punishments?

Why is a knowledge of criminal law of importance to every member of the community?

Is there any real distinction between a crime and a misdemeanor?

What is the true distinction in respect of criminal acts?

What is Blackstone's distinction between public and private wrongs?

What is the account given by Mr. Justice Coleridge of the nature of the distinction, in English law, between a crime and a civil injury?

In what respect does a crime include a civil injury?

What is the distinction between felony and misdemeanor, in respect of the right of private redress by civil proceedings?

What great alteration was introduced in the year 1846, in the English law?

How has it affected the ancient maxim, *Actio personalis moritur cum persona?*

State the nature of this great legislative change.

Does it extend to a case of conviction, or acquittal on a charge of murder?

CHAPTER LXI.—(Pages 580—594.)

EXCUSES FOR THE COMMISSION OF A CRIME.

To what single consideration may be reduced all pleas and excuses for crime?

What is indispensable to constitute a crime cognisable by law?

Why is an overt act, or open evidence, of an intended crime necessary?

What are the three cases in which the *will* is not deemed to concur with the *act?*

Explain the grounds on which each of these cases proceeds.

To what extent is infancy recognised as affording an immunity from the consequences of committing a crime?

How in the case of idiotcy or lunacy?

Explain the maxim, *Actus non facit reum, nisi mens sit rea.*

What is the presumption of law as to sanity or insanity?

How ought a judge to direct a jury when the plea of insanity is set up as an excuse?

What is the proper question to propose to them?

What is the character of the fantastic and dangerous doctrine of *moral insanity, and uncontrollable impulse?*

Is it consistent with English law?

Does drunkenness extenuate, or aggravate, crime?—Why?

May drunkenness be taken into consideration, when the question is as to *intention?*

What is the character of an unlawful act, committed by chance or misfortune?

On what does the distinction depend?

Is there any difference between ignorance, or mistake, in respect of fact and law?

What is the true doctrine as to ignorance of the law?

Is there any case in which it may be taken into consideration?

What estimable operation on the will, have compulsion and inevitable necessity?

State the principles on which is founded the obligation of civil subjection.

Explain the extent to which the doctrine of constraint of a superior, is carried, in the case of a crime committed by a married woman.
What is the nature of the principle in such cases, and how may it be rebutted ?
What is the doctrine of the law, concerning acts done under duress, threats, or menaces ?
If a man, being assaulted, have no other mode of escaping death, may he kill an innocent person ?
How does the law regard the act of a man driven to choose between two evils, and choosing the lesser, though occasioning death to another ?
Illustrate this.
Does extreme necessity, from want of food or clothing, justify, according to English law, stealing either ?
On what principle ?
Who is held guilty, where one of sound mind causes one of unsound mind to commit a crime ?

CHAPTER LXII.—(Pages 595—600.)

HIGH TREASON AND MISPRISION OF TREASON.

Is there now the offence of petty treason ?
What was the change effected in the year 1828 ?
Define high treason, and give Montesquieu's reason for requiring this offence to be the most precisely ascertained ?
What are *constructive* treasons, and do they now exist in the law ?
On what statute is now founded the law of treason ?
Mention the five branches of high treason ?
What is meant by "compass and imagine ?"
Can spoken words amount to treason ?
What is an *overt* act ?
What is misprision of treason, and how punishable ?
What statute in the year 1842 reduced certain treasons to the degree of felony, and how are they punishable ?
Within what time, and with what exception, must treason be prosecuted ?
How many witnesses are requisite, and with what exception ?
What means are afforded the accused to provide for his defence ?
Can you give the instructive exposition by Chief Justice Tindal of the nature of this heinous offence ?

CHAPTER LXIII.—(Pages 601—604.)

FELONY AND MISDEMEANOR.

Define felony, and say whether it includes treason.
Is there any distinction now between grand and petty larceny?
What is the true criterion of the offence of felony?
Give the etymology of the word, and explain how it came to signify the offence.
Have you any remark to offer, on the sometimes arbitrary distinction between felony and misdemeanor?
State a recent and important alteration of the law with reference to trials for felony.
Is there any, and what, attempt to commit felony, which is declared to be of itself a felony?
Is an attempt to commit a felony or misdemeanor, itself an offence?

CHAPTER LXIV.—(Pages 604—626.)

HOMICIDE.

Into how many kinds did the law, till lately, distinguish homicide?
Into how many is it distinguishable now? And why?
Why is the former division nevertheless retained in this chapter?
How many kinds of *justifiable* homicide does the law recognise?
State them, and assign the reasons on which they depend.
What kinds of crime may be prevented, if necessary, by killing?
Is the slayer in such cases guilty of any kind of fault whatever?
When is homicide excusable?
What difference is there between death occasioned in lawful, and unlawful, sports and games?
When is homicide in self-defence excusable?
State the important distinctions involved in this.
What is that between homicide in self-defence, and manslaughter?
What offence is fighting a duel?
Is it an offence to send a challenge to fight a duel?
What is the case, and principle involved in it, put by Lord Bacon, of two drowning men getting on a plank, capable of saving one only?

How did the civil law deal with suicide ?
How does the English law regard it ?
What is the guilt of one inciting another to commit suicide, and how punishable ?
What constitutes a *Felo de se* ?
How is the body of a *felo de se* now dealt with ?
What is the legal signification of the expression "*commit* suicide ?"
What question lately arose on it ?
Give the substance of Archbishop Whately's objections to the propriety of the term "*self-murder*."
Define manslaughter.
What are the two kinds of this offence ?
What is the cardinal distinction between manslaughter and murder ?
What is the rule as to liability in case of gross carelessness, or unskilfulness, in performing duties dangerous to others ?
Does one guilty of manslaughter, now incur any civil, in addition to criminal liability ?
How may the offence be described, in an indictment ?
Are there any accessories *before* the fact, in manslaughter ?
What was the Mosaical Law on the subject of murder ?
What awful reason is given in scripture, for requiring a murderer to be punished with death ?
How does Sir Edward Coke define murder ?
What is now the offence committed by an attempt to commit murder ?
What alteration has lately been effected in the law relating to some atrocious assaults ?
Is it now necessary to set forth in the indictment, the manner or means by which death was caused ?
How may the offence be charged ?
What offence is that of bearing false witness in order to take away the life of another ?
Suppose an act to be done of which the probable consequence is death, but which was not intended : on what principle does the law deal with such a case ?
Within what time must death ensue, to constitute the act of killing, murder ?
Define *malice aforethought*, and express and implied *malice*, and give instances of each ?
Are both principal and seconds, in a duel, guilty of murder ?
Can affronts by mere words, or gestures, excuse or extenuate acts endangering life ?
What is the *primâ facie* presumption in all cases of homicide ?
On whom is it incumbent to rebut that presumption ?
What is the guilt of an accessory before and after the fact in murder ?

CHAPTER LXV.—(Pages 626—633.)

INDICTMENT; ARRAIGNMENT, AND TRIAL.

What is an indictment ?
What is a grand jury, and how do they act when a bill is submitted to them ?
Explain the nature and importance of this institution ?
What is arraignment ?
State the course adopted if the prisoner stand mute, confess, or plead.
Does the right to *traverse* now exist ?
What corresponding provision is made ?
When only must formal objection be taken to the indictment ?
What are, and how many kinds of challenges are there ?
Is there any difference between challenges in felonies and misdemeanors ?
Is there any difference between challenges by the crown and the prisoner ?
What are talesmen, and when resorted to ?
What is the oath or affirmation of a juryman ?
Can a prisoner charged with felony now make full defence by counsel ?
What power has now a judge if he deem a witness to have committed perjury ?
Describe the nature of the verdict which must or may be given by the jury.
Can a privy verdict be given in a criminal case ?
If acquitted, can a prisoner be tried again ?
What power has a judge of discharging a jury ?

CHAPTER LXVI.—(Pages 634—638.)

JUDGMENT, AND REVERSAL OF JUDGMENT.

What question is put to a prisoner, when he is pronounced by the jury, guilty ?
What kind of objections may he *then* offer in arrest of judgment ?
If he be successful, may he be tried again ?
When sentence of death is pronounced, what is the immediate inseparable consequence ?
Is there any and what difference between a man convicted and attainted ?
How may judgments, and their incidents, be set aside ?

May a judgment now be set aside without a writ of error? How?

May a writ of error be still brought?

Can it be brought on a summary conviction?

What discretion has the attorney general in writs of error in misdemeanor, with which the court will not interfere?

Give an outline of the newly established system for deciding criminal appeals, particularly as to the nature of the question submitted to it, and the large powers of the court.

How does the rule *Nemo debet bis vexari pro eâdem causâ*, apply to the case of a reversed judgment?

Can an attainder be reversed, and how?

CHAPTER LXVII.—(Pages 639—646.)

REPRIEVE; PARDON.

What is a reprieve?

Whom does our law entrust with the power of pardoning, and on what grounds?

What did Lord Holt say on the subject?

How does Lord Coke speak of this prerogative, and define a pardon?

State the limitation on the exercise of this prerogative, especially with reference to parliamentary impeachments.

How is a pardon granted?

How many kinds of pardon are there?

What is the effect of a conditional pardon, and undergoing the punishment?

What strange point was started in the year 1848, and what was in consequence done by the legislature?

What is the effect of a pardon?

What was said by Lord Holt, and Mr. Justice Patteson?

CHAPTER LXVIII.—(Pages 647—656.)

PUNISHMENT; EXECUTION.

What reason may a female prisoner, capitally committed, offer in stay of execution?

Mention a case which occurred in the year 1847, with reference to a jury of matrons.

Is the species of punishment *ascertained*, by the law of England, for every offence? Is it so with the *degree?*

What does the Bill of Rights provide with respect to punishments?

Enumerate the existing modes of punishment.

On what does the *quantum* of fines depend?

What was done by parliament when a fine of 30,000*l.* was inflicted on a nobleman?

State the law of forfeiture, and in respect of what offences it exists.

In which does the corruption of blood ensue?

When was hard labour first imposed?

For what punishment, and when, was whipping instituted?

Can it be inflicted on a woman for any offence?

Is there any, and what, case in which it may be inflicted on an adult male?

When was transportation first inflicted?

State a recent alteration in the law of transportation, and the reason of it.

State recent powers conferred on the court, in dealing with transportable offences.

What is the punishment inflicted on a man or a woman, convicted of high treason?

What powers are reserved to the sovereign?

When may judgment of death be merely recorded, instead of being formally and publicly pronounced, and with what object?

How is the punishment of death now inflicted in any other capital case than treason?

What humane relaxations in the treatment of one condemned to death, have been lately effected?

Does the law know any distinction of persons in dealing with crime?

What statute was passed in 1841 with reference to a peer convicted of felony?

CHAPTER LXIX.—(Pages 657—697.)

RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND TO THE YEAR 1768-9.

What are the six periods in the progress of our laws that are considered in the foregoing chapter?

With regard to the FIRST of these periods, do Cæsar's Commentaries supply any valuable information? What?

What is the great parent source, here pointed out, of the confusion and uncertainty in the laws and antiquities of this kingdom?

What does the Commentator seek to illustrate, when he speaks of the difficulty of discerning the changes of the bed of the river, which varies its shores by continual decreases and alluvions?
What was the influence of the heptarchy, upon our laws and antiquities?
What effect had the Danish invasion and conquest?
What part did EDGAR take in these affairs?
State some of the most remarkable of the SAXON laws.
What great event dates the commencement of the SECOND period of our legal history?
What was the first of the alterations then effected?
What were the *forest laws*, and what was their effect?
What great change was effected in the constitution and mode of working the *courts of justice*?
What was the effect produced by introducing the subtleties of NORMAN jurisprudence?
What are the observations made upon this topic by the Commentator?
What was the last and greatest alteration effected, at this period, in our civil and military polity?
What line of policy was adopted by HENRY I.? By STEPHEN?
In what condition was HENRY THE FIRST'S charter, in the time of Henry II.?
What great legal writer flourished in the reign of HENRY II.?
What are the four great points to be noticed in the history of the reign of HENRY II.?
Is there anything worthy of note, in a legal and constitutional point of view, in the reign of RICHARD I.?
What are the leading features of the reigns of JOHN and HENRY III.?
What may be considered as the commencement of the THIRD period of our legal history?
What did Sir Matthew Hale remark concerning the first thirteen years of the reign of EDWARD I.?
Can you give an outline of the leading reforms originated and carried into effect by this King?
Did he increase or limit the powers of the Pope, and his Clergy?
Did he prescribe any, and what, rules to the superior and inferior courts of justice?
What effect had the statutes of *Quia Emptores*? of Winchester? of Mortmain?
Did he do anything towards ameliorating the general method of legal proceedings?
Did he attend to the interests of commerce and manufactures?
What interrupted the progress of juridical improvement from the time of EDWARD I. to HENRY VII.?
What were *Fines*, *Recoveries*, *Uses*?
Do you understand the explanation of the latter terms, given in the note to page 680—683?
What was the distinguishing character of the reign of HENRY VII.?

How did he go to work to obtain these ends?
From what reign may the FOURTH period of our legal history be dated?
What was the first great feature of this reign?
What were the means by which a fundamental change was then effected in the laws of property?
What indicated the rapid growth of the commercial character of the people in this reign?
What was the state of the royal prerogative in this reign?
What remark does the Commentator make upon the reign of QUEEN MARY? Of QUEEN ELIZABETH?
What were the 'restraining statutes?'
Was any provision made for the relief of the poor, in the latter reign?
Had this Queen an arbitrary and despotic tendency?
Were the importance and power of the commons increased or diminished, during this reign? By what means?
What were the chief characteristics of the reign of JAMES I.?
Were any attempts made, in this reign, to improve the administration of justice?
What were the leading features of the reign of CHARLES I.?
From what event is the commencement of the FIFTH period dated?
What was the first grand change effected in the reign of CHARLES II.?
What great measure of this reign does the Commentator compare with Magna Charta, and distinguish from it? How?
What other measures of importance distinguished this reign?
What is the SIXTH and last period of our legal history, fixed by the Commentator?
Can you give a general account of the spirit and tendency of the legislative changes effected immediately after the revolution of 1688?
What are the general conclusions drawn by the Commentator from the foregoing summary?

QUESTIONS ON MR. JUSTICE COLERIDGE'S CONTINUATION OF THE HISTORY OF THE LAW, DURING THE FIRST FORTY YEARS AFTER THE DEATH OF SIR WILLIAM BLACKSTONE, I.E. TO THE YEAR 1825.

What improvements during the interval of these years, were effected in legal and judicial matters?
Was any, and what, alteration made in respect of arrest on mesne process?
Was the severity of punishments increased, or diminished?
State the nature of the changes effected.
What acts of public permanent importance were passed?
Were any, and what, measures enacted to secure the integrity of the representative body?

What measures respecting internal polity were passed?
Was anything done with reference to the bankruptcy and insolvency laws?
To relieve the disabilities of Dissenters and Roman Catholics?
Were the navigation laws interfered with; and with what object?
Was anything done with reference to parochial registers, and estimating the population?
Was any modification made of the system of poor laws?
Of Friendly Societies, and Savings Banks?
What may be regarded as the two grand measures signalising that interval?
What reflection may be suggested by the facility of legislation?
What is regarded as the leaning of Sir William Blackstone's mind?
What may be considered the general characteristic of the legislation during the half century elapsing since the death of Sir William Blackstone?

QUESTIONS ON THE CONTINUATION BY THE LATE MR. JOHN WILLIAM SMITH, OF THE HISTORY OF OUR LAWS FOR THE FIRST TEN YEARS AFTER THE YEAR 1825, I.E. TO THE YEAR 1836.

Were the changes during this brief interval, numerous and great?
What were the two great alterations made in *the constitution?*
What were the four great measures affecting our *colonial interests?*
What was the character of the legislation affecting *domestic polity?*
Which departments were the subjects of such legislation?
Enumerate the leading acts passed with a view to benefit the *commercial interests.*
What improvements were effected in the *general administration* of the law?
What were the principal enactments made concerning private property?
What improvements were effected in our criminal law?
By what characteristic may the English people be considered as remarkably distinguished?

QUESTIONS ON THE CONTINUATION OF THE HISTORY OF OUR LAWS DURING THE NINETEEN YEARS FOLLOWING THE YEAR 1836, I.E. TO THE MIDDLE OF THE YEAR 1855.

What special reason is there for exhibiting a faithful picture of legislation during this interval?
How was inaugurated the great change effected in the constitution of the country, in the year 1832?
What was predicted by one of its leading promoters?

Has it been verified, or falsified?

What consideration may be suggested by a view of what has been since attempted, and effected, by the legislature?

What are the leading features of change in respect of our FOREIGN relations?

How would you describe their scope and tendency?

Have our COLONIAL relations occasioned peculiar solicitude to the mother country? Why?

What appears to have been the object of imperial legislation for the colonies?

Recapitulate the chief measures which have been enacted with a view to advancing the religious, social, and commercial welfare and interests of the colonies.

Does any of them affect the law of *transportation?* Why?

Have great changes been effected in our DOMESTIC ECONOMY?

Are they characterised by any particular tendency in respect of the three united kingdoms?

Which of them is a bold legislative interference with the rights of private property?

What acts relate to the personal rights and interest of the Sovereign and the Royal Family?

What did the queen do with respect to her hereditary revenues?

With reference to the income-tax?

Were any, and what, acts passed for further protecting her majesty's person?

Why were they rendered necessary?

Was any alteration made in the law relating to treasonable offences?

Was any provision made for the possible necessity of a regency?

Has the CONSTITUTION OF PARLIAMENT been improved?

Has any alteration been recently made with reference to the number of secretaries of state sitting in the house of commons?

What has been done, affecting the manner of conducting elections?

With a view to prevent bribery, corruption, and undue influence?

To determining questions arising on the law of election?

As affecting the exercise of the franchise?

As to the parliamentary privilege in the case of its printed publications?

How have our NAVAL, MILITARY, and MILITIA laws been improved?

Have the interests of RELIGION and RELIGIOUS LIBERTY largely occupied the attention of the legislature?

With what immediate view?

Has the Church of England been the object of special solicitude, and with what object?

Has any, and what, provision been made, for the greater sanctity of the sabbath?

Has any enactment been made, and why, against the unlawful assumption of ecclesiastical titles in this country?

Have any liberal enactments been made with reference to Dissenters, Jews, and Roman Catholics?

How has Parliament provided for the prosecution and improvement of education, amongst the upper as well as lower classes?

What has hitherto baffled its efforts?

What has been done with reference to the two great universities, and other collegiate and scholastic institutions?

Has anything been effected for the vigilant supervision of charitable trusts?

Has the legislature promoted the RATIONAL ENTERTAINMENT AND INSTRUCTION OF THE PEOPLE?

How?

What has it done to encourage habits of prudence, forethought, and economy?

Has it promoted the health, cleanliness, and comfort of all classes? and by what means?

By what means has any improvement been made in the administration of our POOR LAWS?

In PRISON DISCIPLINE?

What are the twin roots of the Upas tree of crime?

Has anything been attempted to destroy them?

Have WOMEN AND CHILDREN been the subject of anxious solicitude?

What is the scope of its enactments with this view?

Has anything, and what, been done with reference to IDIOTS and LUNATICS, their custody, care, and protection?

Has the legislature been also mindful of the ANIMAL CREATION?

What has it done to prevent and punish cruelty to them?

Has it placed RAILROADS under any general superintendence, to protect the public interests?

Have the interests of AGRICULTURE been affected by recent legislation?

What is the foremost and vital instance of it?

What valuable practical improvements have been introduced into the laws affecting agriculture, and in particular the relation of landlord tenant?

Have the COMMERCIAL interests of the country been similarly affected?

Mention the leading changes effected into our mercantile system.

What ancient statutes have been repealed?

On what footing do the Navigation Laws now stand?

And the Mercantile Marine?

Mention other matters which have been the subject of legislative interference, particularly as to—the Usury Laws? Emigration? Bankruptcy? Insolvency? The banking system? The customs? Joint-stock companies? Taxes? The postal system? Patents and copyrights?

What measures of STATISTICAL interest and importance have been passed? The geological survey of the kingdom?

The system of civil registration ?
The Census of the population ?
Mention some important alterations lately effected in the SUBSTANCE and PRINCIPLES of the law.
The law of libel ? Compensation in case of homicide, felonious, or otherwise wrongful ? The wages of seamen ? Deodands ? Wagers ? Gaming?
Have vast improvements been effected in the ADMINISTRATION OF EVERY DEPARTMENT OF JUSTICE ?
The Court of Admiralty ?
The judicial committee of the Privy Council ?
The Superior Courts of Common Law ?
The courts of Equity ?
The Criminal courts ?
What are the leading characteristics of the legislation affecting them ?
What has been done with reference to our system of punishments and the reform of offenders ?
In what respect would recent legislation have gladdened a Coke and a Blackstone ?
What did the former say on the subject of 'presenting justice ?'
Why is it profitable to consider, as well measures carried, as proposed and rejected ?
What is now of supreme importance, with reference to the temper and action of the two houses of parliament ?
On what does the constitution and character of the House of Commons depend ?
What did Mr. Justice Coleridge say on the relation between our institutions and Public Opinion ?
What is the only true source of vitality to our institutions ?
What is now the paramount duty of the country ?
What is the code of civil and religious conduct dictated by Inspiration ?

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THE END.

BRADBURY AND EVANS, PRINTERS, WHITEFRIARS.

